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Supreme Court of the United States

October Term, 1994

NATIONAL AMUSEMENTS, INC.,

Petitioner,

vs.

TOWN OF DEDHAM,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the constitutionality of an alleged "time-place-and-manner" municipal by-law banning First Amendment activity (here, both the right to show and to see "midnight movies") be sustained *on summary judgment,* when there is record evidence that the alleged "substantial governmental interest" to be served was based upon sham citizen complaints that masked racial animus against midnight movie patrons who were largely African American?

2. Can the First Circuit's affirmance of summary judgment be squared with (a) this Court's ruling in *Turner Broadcasting System, Inc. v. Federal Communications Commission,* __ U.S. __, 114 S. Ct. 2445, 2471 (1994) (quoting *Edenfield v. Fane,* __ U.S. __, 113 S. Ct. 1792, 1798-99 (1993)), that when

> the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." [citation omitted]. It must demonstrate that the recited harms are *real, not merely conjectural,* and that the regulation will in fact alleviate these harms in a direct and material way?

(Emphasis supplied); or (b) the Ninth Circuit decision in *Acorn Investments, Inc. v. Seattle,* 887 F.2d 219 (9th Cir. 1989) and the Eighth Circuit decision in *Krueger v. City of Pensacola,* 759 F.2d 851 (11th Cir. 1985), requiring government to produce both relevant and reliable evidence that protected speech *actually* causes alleged harms in the form of adverse "secondary effects"?

3. Is a municipal "time-place-and-manner" by-law imposing restrictions on all licensed entertainment unconstitutionally overbroad, because it reaches many forms of entertainment that do not even arguably produce the adverse "secondary effects" allegedly caused by the midnight movies it was intended to proscribe?

PARTIES TO THE PROCEEDING

Petitioner is National Amusements, Inc., a Maryland corporation, which owns a majority of the voting shares of Viacom, Inc., and approximately one-fourth of the shares of WMS Industries, both of which are publicly traded corporations. Respondent is the Town of Dedham, a Massachusetts municipal corporation.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding iii

Table of Contents iv

Table of Citations v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions, Statutes and Municipal By-Laws Involved 1

Statement of the Case 2

A. Introduction 2

B. Overview of the Facts 4

Reasons for Granting the Writ 12

I. The summary judgment should be reversed *per curiam* because the trial court improperly resolved disputed issues of fact relevant to whether there was a "substantial governmental interest" to justify the abrogation of First Amendment freedom. 12

Contents

Page

II. If *per curiam* reversal is not warranted, this Court should grant the writ to review the conflict between the decision below and this Court's decisions; and decisions in the Ninth and Eleventh Circuits. 18

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Airport Commissioners of Los Angeles v. Jews for Jesus, 482 U.S. 569 (1987) 17

Acorn Investments, Inc. v. Seattle, 887 F.2d 219 (9th Cir. 1989) .....i, 16, 19

Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981) 13, 15

Basiardanes v. Galveston, 682 F.2d 1203 (5th Cir. 1982) 13

Board of Education v. Pico, 457 U.S. 853 (1982) 15

Boston v. Back Bay Cultural Association, Inc., 418 Mass. 175 (1994) 17

Edenfield v. Fane, __ U.S. __, 113 S. Ct. 1792 (1993) .....i, 12, 13, 15, 18

Contents

Page

Home Box Office, Inc. v. FCC, 567 F.2d 9 (D. C. Cir.), *cert. denied*, 434 U.S. 829 (1977) 17

Krueger v. Pensacola, 759 F.2d 851 (11th Cir. 1985) .....i, 16, 19

Kuzinich v. Santa Clara, 689 F.2d 1345 (9th Cir. 1982) ... 13

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 20

Leverett v. Pinellas Park, 775 F.2d 1536 (11th Cir. 1985) 13

Los Angeles v. Preferred Communication, Inc., 476 U.S. 588 (1986) 17

Metromedia v. San Diego, 453 U.S. 490 (1981) 12

NAACP v. Claiborn Hardware Co., 458 U.S. 886 (1982) 20

People v. Glaze, 614 P.2d 291 (Cal. 1980) 16

Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) ... 15

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) ... 13

Schneider v. New Jersey, 308 U.S. 147 (1939) 8

754 Orange Ave., Inc. v. West Haven, 761 F.2d 105 (2nd Cir. 1985) 15

Contents

Page

St. Mary's Honor Center v. Hicks, __ U.S. __, 113 S. Ct. 2742 (1993) 17

Turner Broadcasting System, Inc. v. Federal Communications Commission, __ U.S. __, 114 S. Ct. 2445 (1994) .....i, 12, 13, 18

United States v. O'Brien, 391 U.S. 367 (1987) 12

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 19

Statutes Cited:

28 U.S.C. § 1254(1) 1

Massachusetts General Law, Chapter 140, § 177A 2

Massachusetts General Law, Chapter 140, § 181 2

Massachusetts General Law, Chapter 140, § 183A 2

United States Constitution Cited:

First Amendment 2, 3, 4, 10, 13, 16, 17, 19, 20

Fourteenth Amendment 2, 10

Rule Cited:

Supreme Court Rule 16.1 18

Contents

Page

Other Authorities Cited:

Dedham By-Law, Chapter XIII, § 57 ..... 1, 2

Boston Globe, March 29, 1991: "For Most of Boston, The Screen Has Gone Dark Two-Thirds Of The City's Residents Cannot See A Movie In Their Own Neighborhood." 6

APPENDIX

Appendix A — Opinion of United States Court of Appeals for the First Circuit Dated January 4, 1995 ..... 1a

Appendix B — Memorandum and Order of the United States District Court, District of Massachusetts Dated February 6, 1994 ..... 39a

Appendix C — Town of Dedham Amended By-Law 60a

Appendix D — Relevant Statutes 61a

Appendix E — Relevant United States Constitutional Amendments 70a

Petitioner, National Amusements, Inc., d/b/a Showcase Cinemas in Dedham, Massachusetts, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit affirming summary judgment for respondent, Town of Dedham ("Dedham"), in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App., *infra*, 1a-38a) is reported at 43 F.3d 731 (1st Cir. 1995); and the Opinion of the District Court (App., *infra*, 39a-59a) is reported at 846 F. Supp. 1023 (D. Mass. 1994).

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on January 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND MUNICIPAL BY-LAWS INVOLVED

This case involves the constitutional validity of a Dedham by-law, Chapter XIII, § 57, which provides that:

> Unless otherwise restricted, no holder of a license issued by the Town of Dedham pursuant to Massachusetts General Laws, Chapter 140, Sections 177A, 181 and 183A, shall permit any activity licensed thereunder to be conducted between the hours of 1:00 a.m. and 6:00 a.m.

(App., *infra*, 60a).

Massachusetts General Laws, Chapter 140, authorizes municipalities, in general, to grant and revoke licenses for amusement devices (§ 177A); theatrical exhibitions, public shows and public amusements for which an admission fee is charged (§ 181); and concerts, dances, cabarets and public shows conducted on premises licensed for sale of food, beverages or alcohol (§ 183A). (App., *infra,* 61a-69a).

The United States Constitution's First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ."; and the Constitution's Fourteenth Amendment provides in pertinent part: "nor shall any state deprive any person of life, liberty or property without due process of law. . . ." (App., *infra,* 70a-72a).

STATEMENT OF THE CASE

A. Introduction

In November 1989 the Town of Dedham, a suburb of Boston, adopted a by-law, Chap. XIII, § 57, specifically designed to ban altogether the commercial exhibition of motion pictures after 1 a.m. (R. A1092, A1146, A1159, A1393, A1872, A2212 and A2678).[1]

Petitioner, National Amusements, Inc., owns and operates a cinema complex in Dedham under the name Showcase Cinemas that exhibits popular films to the public at large, including late shows beginning around midnight on Friday and Saturday evenings.[2] It is undisputed that Dedham's by-law was passed to

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1. All citations to the Record ("R.") refer to the Appendix filed with the Court of Appeals.

2. Petitioner, National Amusements, Inc., is referred to hereinafter as "Showcase Cinemas" or simply "Showcase".

stop Showcase from exhibiting these popular "midnight movies". Showcase sought judicial relief from Dedham's prohibitive by-law on the ground that it violated the First Amendment. Among other First Amendment infirmities, the record developed during discovery exposed Dedham's alleged "purpose" in enacting the by-law — the preservation of late-hour "peace and tranquility" — as a pretext to keep midnight movie patrons who are predominantly African Americans out of town late at night.[3] When Dedham citizens who had complained of late night disturbances were put to the test of testimony *under oath,* their complaints were recanted or materially modified. *See infra* pp. 7-9. Further, an examination of contemporaneous statements by Selectmen and others strongly points to a racially oriented and discriminatory purpose for the by-law. *See infra* pp. 6-7.

In the face of this record, heavily laden with factual conflict as to the real purpose of Dedham's by-law, the District Court sustained its constitutionality *on summary judgment.* The United States Court of Appeals for the First Circuit then affirmed summary judgment in an opinion that defers to Dedham's legislative "judgment" based on citizen complaints (however flimsy), constabulary "concerns" (however unspecified and unrelated to the cinema) and so-called "commonsense".

This summary judgment calls for an equally summary reversal in this Court, if only because, on this record, it is impossible to find that no factual dispute existed. More importantly, the Court of Appeals' decision licenses a judicial approach to summary judgment in First Amendment cases that imperils First Amendment freedom when the citizenry sets out to ban speech — precisely the setting that inspired the protections

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3. An independent statistical survey showed that the midnight movie audience was predominantly African American (approximately 80%) as contrasted with a predominantly white audience (approximately 75%) at earlier movie showings. (R. A2602).

against majority abuse embodied in the Bill of Rights. Whether Dedham's abridgment of those freedoms was justifiable in service of a "substantial governmental interest", or just a poorly disguised triumph for local prejudice, is a serious fact issue wholly inappropriate for resolution on summary judgment.[4]

B. Overview of the Facts

In Boston, where many movie houses have closed, people who live in urban neighborhoods travel to outlying suburbs, like Dedham, to see motion pictures. It is also sadly true that when large numbers of African Americans enter a predominantly white suburb, they create a perception of potential disturbance or crime even when neither occurs. When this migration occurs late at night, its tendency to generate fear is that much greater. The record in this case reflects that it was just such fear that caused Dedham to ban the Showcase "midnight movies" which were attended largely by African American patrons. (R. A2602).

In 1978, six years after constructing its cinema complex in Dedham, Showcase began exhibiting midnight movies on Fridays and Saturdays. Showcase has always shown popular films, rated, G, PG, PG-13 and R (R. A1595, A2634 and A2694), at these performances, which started around 11:30 p.m. and ended between 1 a.m. and 2:30 a.m. In 1988, *ten years after* the midnight movies began, one John Washek bought a house directly across from the Showcase cinema complex. Washek was opposed to the efforts of Showcase to expand its cinema complex and brought suit to stop the expansion. As part of his campaign against Showcase, Washek solicited his neighbors to sign a petition to ban the midnight movies. (R. A1003-04, and A1717).

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4. Racial animus can have conscious as well as unconscious roots, but either way it undermines the credibility of Dedham's purported government purpose and adversely impacts racial minorities attending the movies.

The race issue immediately reared its head as Washek stirred up the neighborhood with allegations that "there were a lot of serious crime issues, riots, that were stated as *race* riots at the Cinema." (R. A1702). He even took the extraordinary step of preparing a flyer falsely insinuating that the midnight movie patrons had caused crime all over Dedham. (R. A1706-09).[5]

When town Selectmen asked about this, Dedham Police Chief Teehan reported that there were numerous incidents along Route 1, the main thoroughfare, after the midnight movies let out. But he failed to mention that only five of these incidents (four fender benders and one assault, wherein Showcase cinema patron was the victim, not the culprit) occurred after midnight on Fridays or Saturdays; and he could not attribute any of these five incidents to midnight movie patrons.[6]

Without any apparent further inquiry, investigation, or independent study, the Dedham Selectmen prepared the predecessor of the by-law challenged herein and placed it on the warrant for Dedham's Annual Town Meeting.

Only then did the Board of Selectmen invite neighbors of Showcase to air their concerns about the cinema complex and suggest that they, together with the Chief of Police, meet with a

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5. Although Washek conducted a review of the Dedham Police "blotter" to prepare a summary of "incidents" reported after midnight, his summary did not show any incidents within the neighborhood adjacent to the cinema complex or any incidents directly attributable to midnight movie patrons. (R. A1707, A1931 and A2096).

6. On deposition, when Chief Teehan was asked about crimes surrounding the Showcase cinema complex he observed that, while there was a "perception" among neighborhood residents that it was less safe because of the theaters, "the statistics I've reviewed would indicate that we haven't had, in those particular neighborhoods at this time, any serious crimes." (R. A1554).

Showcase Vice-President to try to resolve the concerns. (R. A1007 and A2253). A series of meetings ultimately led to a program successfully implemented by Showcase to address the neighbors' concerns, even though they did *not* relate in any way to the midnight movies.[7] (R. A1861).

Notwithstanding Showcase's successful program to resolve neighborhood concerns, at Dedham's Annual Town Meeting in April 1989, the Dedham Selectmen pressed for adoption of a by-law to ban the midnight movies. During the Meeting, thinly disguised racial slurs became common currency, as Selectmen and citizens reviled Showcase in their discussions of the proposed by-law. The alleged midnight movie trouble-makers were euphemistically described as coming from "out of town." Selectman Hoell referred to them as "nice little out-of-towners" and the "undesirable element that's attracted by General [sic] Cinema activity." (R. A1903-04). Selectwoman Kehoe referred to "these young kids, who don't even live in Dedham." (R. A1873). And later, Selectman Taurasi called them "kids from different neighborhoods."[8]

In this context, it is a demonstrably reasonable inference that these references to foreign elements in Dedham were just code words to mask racial biases. Movie patrons do not carry signs announcing where they live. Coupled with the statistical truth that most patrons of the "midnight movies" were African American, these tell-tale phrases describing the patrons as

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7. In a stroke that is as wrong-headed as it is ironic, the Court of Appeals read petitioner's willingness to address citizen concerns as a confession that the midnight movies actually caused problems.

8. Quoted in *Boston Globe*, March 29, 1991: "For Most of Boston, The Screen Has Gone Dark Two-Thirds Of The City's Residents Cannot See A Movie In Their Own Neighborhood."

"different" could only reflect a *visible* difference like skin color, which would be conspicuous in predominantly white Dedham.

Moreover, when the very citizens who charged midnight movie patrons with creating crime and other disturbances were examined on deposition, their charges withered away. For example, one resident complained at Town Meeting that "sixteen windows were smashed at Papa Gino's Plaza," but he admitted when *under oath* that there was no evidence that midnight movie patrons had smashed the windows or committed any other crimes in Dedham. (R. A449-450 and A1473-74).

Another damning, but equally misleading complaint, was voiced at Town Meeting by Selectwoman Kehoe who charged that "because of the attraction at [the Showcase] corner we have had fences that have been put up by residents destroyed, graffiti written all over them, rocks thrown through windows of residents in the area." (R. A480). But testifying under oath, the Selectwoman had to admit that she did not know whether these offenses were committed by cinema patrons or even when they occurred other than "after dark." (R. A1205-06).

Selectman Hoell poisoned the atmosphere at Town Meeting further by falsely stating that midnight movie patrons had committed serious criminal acts:

> Despite Mr. Reid's eloquence, he certainly doesn't live in the neighborhood. He has not come out of that theater, started up his vehicle and found all four wheels drop off the car. He's not had a fifteen or sixteen year old youngster up in that particular area on an extremely cold night, two of them, stripped of their jackets.

(R. A474-75). As often happened in this case, this accusation was completely deflated at deposition when the Selectman admitted under oath that he had no evidence to connect the culprits with midnight movie patrons. (R. A1141).[9]

Complaints about traffic, noise and trash proved equally insubstantial. Under oath in deposition one complainant, who had asked Town Meeting to "imagine" 2,000 cars "coming out of the theater burning rubber, screaming down the highway and raising general hell", confessed that there was no basis other than his inflated imagination for stating that 2,000 cars might come out of the theater parking lot at once.[10]

Likewise, no witness ever specifically attributed litter to any midnight movie patron. (*See* R. A1723).[11] And, to the extent that patrons were said to produce noise coming out of the midnight movies and cutting through the neighborhood, that was eliminated *without curtailing speech* by posting a "Dead End"

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9. As to a so-called "lug-nut" incident, Showcase proffered evidence showing that it actually occurred on Friday, January 27, 1989, at 9:45 p.m. (R. A1867), almost two hours *before* the midnight movies even began; and as to the "jacket" incident, Showcase proffered evidence showing that it occurred on Sunday, December 11, 1988, at 11:50 p.m., a full day *after* the exhibition of midnight movies. (R. A2096).

10. Showcase proffered evidence that in 1988-89, for example, about 350 patrons attended the midnight movies per night, which strongly suggests there were no more than 350 cars, and probably far fewer, exiting the cinema parking lot late at night. (R. A2213).

11. Moreover, a city's interest in preventing litter has been held insufficiently strong to justify curbing First Amendment rights, given less restrictive alternatives including punishing those who do it. *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939).

sign opposite the cinema parking lot at the roadway entrance to the adjacent neighborhood area. (R. A1009).[12]

Nonetheless, at the Annual Town Meeting the predecessor to the ordinance in question here was adopted. Subsequently, the Massachusetts Attorney General found this predecessor by-law unconstitutional, because it distinguished between different types of entertainment and therefore lacked content neutrality.[13] Undaunted, the Selectmen revised the by-law in an effort to remove any suggestion of content based regulation and placed the revised by-law on the warrant for a Special Town Meeting in November 1989, where it was duly adopted.[14]

Although Dedham's by-law purports to ban all licensed entertainment in Dedham between 1 a.m. and 6 a.m., no entities other than Showcase were actually operating past 1 a.m. and, as the members of the Board of Selectmen acknowledged at meetings and in deposition, its purpose was "to bring about the passage of a bylaw that would ban the midnight movies." (R. A1092, A1146, A1159, A1393, A1872, A2212 and A2678).

Accordingly, Showcase brought suit to enjoin enforcement

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12. Indeed, Dedham's own police witnesses disputed that the midnight movie patrons were loud or boisterous as compared with those who attended movies earlier in the evening. (R. A1059-60 and A1113-14).

13. This predecessor ordinance banning licensed entertainment between 12:30 a.m. and 6 a.m. excepted ballroom dance halls from its proscription, because Dedham Selectmen did not want to eliminate "healthy entertainment" late at night. (R. 2010).

14. The parties agreed to suspend the effect of the by-law *pendente lite*. That suspension was in effect for 4 years and there is nothing in the record to suggest that Dedham is any the worse for it.

of the Dedham by-law. However, the District Court granted summary judgment for Dedham upholding the by-law's constitutional validity against the claim that it cannot meet the demands of "intermediate scrutiny" under the First and Fourteenth Amendments.[15]

The Court of Appeals mocked Showcase's contention that there was no substantial evidence of a "significant governmental purpose" to support the by-law. The court did not even acknowledge the existence of evidence, undeniably present in the record, that creates a factual conflict on that point. Belittling its own recitation of the elements of summary judgment as a "mantra" and Showcase as "merchants of conjecture", the Court of Appeals simply concluded, largely on the basis of say-so, that Dedham's by-law passed the "governmental purpose test." (App., *infra,* 22a).

First, the Court of Appeals observed that Dedham had stated its enacting purpose as the preservation of "peace and tranquility during the late evening hours." (App., *infra,* 18a). It then held that "such an interest, *in the abstract,* suffices to justify a content-neutral restriction on protected speech. . . ." (App., *infra,* 18a) (emphasis supplied). On that reasoning, the court said it need only decide whether Dedham's by-law was based on good reason, without regard to the facts underlying its purpose or passage. (App., *infra,* 22a n.10).

Consistently, the Court of Appeals did not point to a single instance of crime, litter, or noise. Instead, it focused on "the abstract" and held that a legislature can rely upon " 'whatever

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15. Although Showcase contends that the by-law is not content-neutral and thus calls for the highest level of scrutiny, for purposes of this petition it is enough to examine the by-law under "intermediate scrutiny", for it cannot pass muster even under that lesser standard.

evidence it reasonably believes to be relevant to the problem' at hand."[16] (App., *infra*, 21a) Here, the Court of Appeals held, Dedham could properly rely on "citizen complaints" without confirming any of them, "constabulary concern" about "a pattern of incidents" even though these incidents were only speculatively tied to the midnight movies, and "a commonsense realization" that the "placidity of a residential community will be jeopardized by an activity that regularly draws hundreds of late-night patrons, most in automobiles. . . ." (App., *infra*, 22a).[17]

Finally, the Court of Appeals simply disparaged verbal evidence of racial animus by dismissing the suspect language as "at worst ambiguous" and "too much of a stretch" to require trial. (App., *infra*, 24a, 26a).

Put otherwise, the Court of Appeals affirmed summary judgment by: (1) rejecting on its own the deposition testimony that had undermined both the relevance of citizen complaints and alleged connections between disturbances and the midnight movies; (2) resorting to so-called "common sense"; and (3) precluding any opportunity for a trial to determine whether "out of town" was nothing other than a cloak for racial fear.

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16. On the other hand, the court seemed to acknowledge that "governmental interest woven exclusively out of the gossamer threads of speculation and surmise cannot be termed substantial. . . ." But it never explained or demonstrated how a court goes about determining whether an alleged governmental purpose is no more than theoretical. This would have been a perfect case in which to illustrate that distinction.

17. The Showcase cinema complex is located in a commercially zoned area of Dedham at the approximate junctions of Route 1, a busy thoroughfare, and Interstate 95, a major highway.

REASONS FOR GRANTING THE WRIT

I.

THE SUMMARY JUDGMENT SHOULD BE REVERSED *PER CURIAM* BECAUSE THE TRIAL COURT IMPROPERLY RESOLVED DISPUTED ISSUES OF FACT RELEVANT TO WHETHER THERE WAS A "SUBSTANTIAL GOVERNMENTAL INTEREST" TO JUSTIFY THE ABROGATION OF FIRST AMENDMENT FREEDOM.

To defend a law that abridges the freedom of speech, government must show that the law in question "furthers an important or substantial government interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1987). *See also, Metromedia v. San Diego*, 453 U.S. 490, 507 (1981). This is a fact issue. Accordingly, where as here, Showcase has brought the facts into dispute by marshalling its own conflicting evidence, the issue cannot be resolved on summary judgment, but must be left for trial.

How does one bring the facts into dispute on the "governmental interest" issue? As it was done here, by cross-examining the government's witnesses in deposition to show that their "evidence" of an alleged evil is flimsy at best, and by presenting other evidence to show that an illegitimate purpose lies behind the enactment. These avenues of proof give expression to the law as this Court has recently articulated it. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, ___ U.S. ___, 114 S. Ct. 2445, 2471 (1994) (government must show that the legislature has drawn reasonable inferences based upon "substantial" evidence); *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792, 1798-99 (1993)

(government must demonstrate that the evils are "real" and that its restrictive law will materially diminish them).[18]

In sustaining summary judgment, the Court of Appeals essentially defied *Turner* and *Edenfield* by failing to exercise its responsibility to ensure that the government's alleged "significant purpose" is put to the test — here, by trial of the factual conflict. Instead, in the face of a record that seriously undermined the government's showing, the Court apparently buoyed up the government's case by what amounts to little more than *ipse dixit* and thereby denied defendants their right to trial on an important free speech question.

First, the court announced that Dedham's mere articulation that it enacted the ordinance to "preserve peace and tranquility" is sufficient to justify the by-law, assuming the other requirements of intermediate scrutiny are met. But on that theory any First Amendment activity is subject to shut-down upon the assertion by government of a plausible interest in peace and tranquility. To take the classic example, there is nothing that can threaten peace and tranquility more than an unpopular speech by an unpopular speaker. However, it is precisely to protect the unpopular that the First Amendment imposes tests which a law must satisfy even at the level of "intermediate scrutiny." And it is not a long step from the unpopular speaker to the unpopular group whose First Amendment right to see a movie late at night is eliminated by a

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18. Even before *Turner* and *Edenfield*, which were virtually ignored by the Court of Appeals, there was a large catalog of cases applying these standards to test the substantiality of a proffered government interest and the utility of its allegedly remedial law. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Leverett v. Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Kuzinich v. Santa Clara*, 689 F.2d 1345 (9th Cir. 1982); *Basiardanes v. Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981).

ban "to get the trouble out of town earlier," (R. A447), enacted on the pretext that it will "preserve peace and tranquility."

Although the court below paid lip-service to the notion that an alleged governmental purpose based on "speculation and surmise cannot be termed substantial," it did nothing to ensure that speculation and surmise had not carried the day in Dedham. (App., *infra,* 19a). Stating with conspicuous rhetorical flourish that this record consists of "sturdier stuff" which "tells a story that strongly supports Dedham's stated purpose," the court said that it would "canvass certain key pieces of evidence" to show that.[19] (App., *infra,* 19a).

But it did nothing of the kind. Instead, it placed one-sided reliance upon citizen complaints without noting that they had been seriously undermined on deposition by admissions from the citizens themselves, or that their complaints did not even marginally relate to the midnight movies or midnight movie patrons.

Consistently, the court trivialized the total failure of Dedham officials to make any independent investigation to determine whether the citizen complaints had substance, and, if so, any relevance to the midnight movies. The court's technique here was to set up straw-man arguments Showcase never made, for it has never contended that a municipality cannot act unless it "conducts an independent investigation and corroborates each incident" or that a legislature cannot act "without acquiring irrefutable proof."[20] (App., *infra,* 21a). But the case law does

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19. Even if the government's evidence were strong, however, trial is still necessary to decide a factual issue when there is conflicting evidence.

20. The extreme to which the court below went in stuffing the man with straw is manifest in its refutation of a claim no rational person would ever have

(Cont'd)

establish that some verification of the allegedly justifying facts is at least important, and perhaps required in some cases, to ensure that the government's alleged purpose is not mere "speculation and surmise", or worse, a pretext for implementing an illegal aim. *Edenfield v. Fane, supra; Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Board of Education v. Pico*, 457 U.S. 853, 874-75 (1982).[21] The absence of any independent verification is a factor of particular significance in a context like this one where cross-examination of the government witnesses has demonstrated the infirmity of citizen complaints: Given the contradiction in the relevant citizen's testimony, was it really patrons of the midnight movies who broke Papa Gino's windows? Took wheels off cars? Committed crimes elsewhere in Dedham?

Petitioner provided evidence that the answer to each of these questions was "no". At the very least, in light of the conflicting evidence, these were questions to be decided at trial, not on summary judgment, because such answers are critical to an overall determination of whether Dedham's by-law abridging speech served a substantial governmental interest or was instead an illegitimate indulgence of racial fear.

The Court of Appeals was no less unmindful of this Court's rulings in relying upon a so-called "constabulary concern with a

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(Cont'd)
made: "In other words, lawmakers need not bury each piece of described trash before acting to combat litter, or confirm each honking horn before acting to abate noise levels." (App., *infra*, 21a).

21. Both the Second and Eighth Circuits have found that government failed to meet its burden when it did not provide a study supporting legislative restrictions on speech. *754 Orange Ave., Inc. v. City of West Haven*, 761 F.2d 105, 112 n.6 (2nd Cir. 1985) (no record of professional analysis of impact of adult book store on urban life); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659, 661 (8th Cir. 1981) (same).

pattern of incidents . . . believed to have occurred in connection with the exhibition of midnight movies." (App., *infra*, 22a). Typically, its opinion never states what those concerns were, much less substantiates them or ties them into the late-night showings. This omission is particularly telling in light of Police Chief Teehan's inability to provide support to show that any disturbance was caused by a midnight movie patron, and in light of the evidence supplied by Showcase that few disturbances took place at a time that was close to the showing of the midnight movies.

In this respect, the Court of Appeals' decision is flatly in conflict with the approach taken by the Ninth and Eleventh Circuits. *Acorn Investments, Inc. v. Seattle*, 887 F.2d 219, 224 (9th Cir. 1989); *Krueger v. Pensacola*, 759 F.2d 851, 855 (11th Cir. 1985) (constabulary concerns not enough where evidence of linkage to disturbance is tenuous). *See also, People v. Glaze*, 614 P.2d 291, 296 (Cal. 1980) (to support constabulary concerns, city must show criminal activity at picture arcades particularly acute between 2 a.m. and 9 a.m.).

But as tell-tale as any of the arguments deployed by the Court of Appeals is its final reliance upon a common last resort — "commonsense." The court credited Dedham with "a commonsense realization that the placidity of a residential community will be jeopardized by an activity that regularly draws hundreds of late-night patrons, most in automobiles. . . ." (App., *infra*, 22a).

Any such "realization" cannot be regarded as more than marginally relevant to an assessment of the substantiality of an alleged governmental interest in enacting a by-law otherwise offensive to the First Amendment. If it were, any late night First Amendment activity with an appreciable public facet is vulnerable to a ban. The application of so-called commonsense to

the analysis is ultimately little more than a license to "assume" a threat to peace and tranquility — the very sort of assumption (speculation and conjecture) that this Court's cases condemn when First Amendment freedoms are at issue. *Los Angeles v. Preferred Communication, Inc.*, 476 U.S. 488, 496 (1986) ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.") (internal quotation marks and citation omitted); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.' ") (citation omitted).[22]

Finally, in light of the substantial evidence that citizen complaints were either groundless or exaggerated, an inference arises that the real object of the Dedham by-law was other than met the eye.[23] That inference takes on strength from the verbal

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22. Here, the Dedham by-law is particularly capricious because it not only bans Showcase's midnight movies, but all other forms of licensed entertainment in Dedham, including some forms of entertainment, *e.g.*, a piano player at a bar or harpist at a hotel function room, which could not even arguably produce the adverse "secondary effects" that Dedham is ostensibly concerned about. Thus, the by-law proscribes a substantial amount of clearly protected First Amendment activity and is unconstitutionally overbroad. *Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (overbreadth is substantial where it prohibits all protected expression and does not merely regulate expressive activity that might create problems); *Boston v. Back Bay Cultural Association, Inc.*, 418 Mass. 175, 183 (1994).

23. In *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993), this Court ruled that when an employer's reasons for hiring or firing lack credibility and yield a "suspicion of mendacity" they "suffice to show intentional [racial] discrimination." An inference of racial motivation is equally rational here, not only from the failure to sustain the credibility of citizen complaints, but from the suspect language complainants used to describe people from "out of town." *Id.* at 2749.

evidence that racial fear was at play. In this arena, too, the Court of Appeals should not have acted summarily, for whether the alleged racial slurs were "at worst ambiguous" should have been left for trial. Instead, the Court of Appeals simply declared them "insufficient to raise an inference of racial animus." Another *ipse dixit*.

In sum, the damage done on deposition to the credibility of citizen complaints of disturbance and allegedly related police concerns, coupled with the inference that Dedham had an illicit motive in enacting its late-night by-law, presented a case on summary judgment awash in factual conflict. That was particularly so with regard to whether Dedham had made its case that the midnight movies presented a real threat to civic order, or alternatively whether petitioner's showing that the Dedham by-law was evidence born of racial fear should be credited. Accordingly, under fundamental principles of summary judgment law, this Court should reverse summary judgment, *per curiam*. S. Ct. R. 16.1.

II.

IF *PER CURIAM* REVERSAL IS NOT WARRANTED, THIS COURT SHOULD GRANT THE WRIT TO REVIEW THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISIONS; AND DECISIONS IN THE NINTH AND ELEVENTH CIRCUITS.

As noted earlier, the decision below conflicts directly with decisions of this Court, *Turner Broadcasting System, Inc. v. Federal Communications Commission, supra* at p. 12, and *Edenfield v. Fane, supra* at p. 12, that require substantial evidence, not merely assumption or commonsense, to support the constitutionality of a restriction on speech. The same conflict

exists between the decision below and the decisions by the Ninth Circuit in *Acorn Investments, Inc. v. Seattle, supra* at p. 16; and the Eleventh Circuit in *Krueger v. Pensacola, supra* at p. 16.

These cases, and the conflicts they present, raise fundamental questions that merit review in this Court: When government alleges a "substantial purpose" in support of a restriction on speech that calls for judicial scrutiny at an "intermediate level" what kind of evidence must it adduce? How much evidence must be proffered? When is that evidence conclusive so as to warrant summary judgment on that issue?

CONCLUSION

If the "very purpose of a Bill of Rights [is] to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts," *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), the summary judgment below cannot stand. It rests on virtually total deference to a town legislature, at times in the name of "citizen complaints," at times under the banner of "commonsense."

The Town Meeting is a venerable New England institution, but it does not entail legislative hearings or findings. Those who attend can voice their views at will, argue, advocate, dissemble or denigrate — without checks or balances — to achieve personal, social, or political goals. Whatever the democratic virtue of this institution, it carries with it a real threat to First Amendment freedoms when unpopular exercise of those freedoms is at issue. Here, Dedham's Town Meeting was nothing short of a political melee, where Selectmen denounced midnight movies as "unhealthy"; where angry speakers falsely accused petitioner of creating disturbances all over Dedham; and where citizens

shamelessly referred to the late-show patrons as "antisocial" and "trouble".

That is why citizen complaints, unless tested by cross-examination, or verified by independent study, cannot provide an "adequate reason" for restricting speech. Indeed, constitutional scrutiny exists just to put such majoritarian outcries to the test. And that is why, even in more formal legislative settings, this Court has always insisted that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). *See also, NAACP v. Claiborn Hardware Co.*, 458 U.S. 886, 915 (1982).

The vice of unwarranted deference is compounded in a case like this because there was evidence clearly undermining the relevance and credibility of the citizen complaints that allegedly led to Dedham's by-law, not to mention evidence that the by-law was the product of racial bias. In granting summary judgment, both courts below abused this Court's case law and set themselves in conflict with the law in other Circuits. Thus, this Court should intervene by granting the writ of certiorari and remanding this case to the district court for trial.

Respectfully submitted,

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APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JANUARY 4, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1176

NATIONAL AMUSEMENTS, INC.,
Plaintiff, Appellant,

v.

TOWN OF DEDHAM,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. William G. Young, *U.S. District Judge*]

Before
Selya, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

Theodore E. Dinsmoor, with whom *Finnegan and Stanzler, P.C.*, *Philip Y. Brown*, *Grant Schwartz & Brown*, *Tad Jankowski*, and *Lori Wiechelt* were on brief, for appellant

Joyce Frank, with whom *Kopelman and Paige, P.C.* was on brief, for appellee

Appendix A

January 4, 1995

Selya, *Circuit Judge.* This appeal presents a medley of constitutional questions driven by the passage of a municipal by-law that effectively prohibits the exhibition of motion pictures at the town's only theatre between the hours of 1:00 a.m. and 6:00 a.m. After careful consideration of appellant's asseverational array, we affirm the district court's entry of summary judgment in the municipality's favor.

I. BACKGROUND

Plaintiff-appellant, National Amusements, Inc., owns and operates Showcase Cinemas (Showcase), a complex containing 12 theaters located on Route 1 in Dedham, Massachusetts. In 1978, appellant began exhibiting "midnight movies" on Friday and Saturday nights. These performances started between 11:30 p.m. and 12:30 a.m., and ended between 1:00 a.m. and 2:30 a.m.

On January 12, 1989, at a meeting of the Board of Selectmen (Dedham's governing body), Selectman Kehoe raised the issue of secondary effects, expressing particular concern over purported traffic and security problems associated with Showcase's operation of its business. At a selectmen's meeting the following week, after another selectman reported that he had received complaints about disruptions connected with appellant's exhibition of midnight movies, the Board placed a proposed by-law amendment on the warrant for the forthcoming annual Town Meeting.[1] The text of this proposal denominated "Article 40," read in pertinent part:

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1. The venerable institution of the town meeting is perhaps more celebrated in New England than elsewhere. The colonial government of Massachusetts first (Cont'd)

Appendix A

> To see if the Town will vote to amend Chapter XIII of the Town By-Laws by adding the following new section:
>
> Section 42B - No holder of an entertainment license for theatrical exhibition, public show, public amusement, concert, dance or exhibition . . . shall conduct business between the hours of 12 midnight and 6:00 a.m.

The Board also sent a letter to William Towey, appellant's senior vice-president, memorializing its "concern about the problems generating from the Showcase Cinemas after the weekend late shows," and indicating that the Board "would like to discuss this situation. . . ." On February 2, Towey and approximately 30 interested residents met with the selectmen and discussed matters related to the exhibition of midnight movies.

In response to the residents' articulated concerns, Towey conferred with various townsfolk, including the police chief. Thereafter, appellant agreed to undertake, at its expense, a variety of measures designed to enhance security, reduce noise levels,

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(Cont'd)
passed enabling legislation, entitled the "Town Act", in 1636. A 1647 version of the Town Act gave municipalities the "power to make such laws and Constitutions as may concern the welfare of their Town. Provided they be not of a criminal but only of a prudential nature . . . and not repugnant to the publick Laws." 1647 Mass. Town Act, *The Laws and Liberties of Massachusetts* 50 (1648 & reprint 1929). While Dedham's present-day Town Meeting operates under the aegis of the Home Rule Amendment to the Massachusetts Constitution, *see* Mass. Const. amend. art. 2, §§ 1-9, *amended by* Mass. Const. amend. art. 89; *see also Bloom v. City of Worcester*, 293 N.E.2d 268, 274-75 (Mass. 1973), it, too, possesses lawmaking capacity, *see* Mass. Const. amend. art. 2, § 6.

control traffic, and ameliorate the problem of litter. Despite these concessions, the voters approved Article 40 at a Town Meeting held on April 10, 1989 (first amending it to exempt ballroom dancing and to change the closing time to 12:30 a.m.).

Under the Massachusetts scheme, municipal by-laws cannot take effect without the imprimatur of the Attorney General of the Commonwealth of Massachusetts. *See* Mass. Gen. L. ch. 40, § 32. The Attorney General refused to sanction Article 40 on the ground that the proposed amendment, by distinguishing ballroom dancing from other forms of dance, was not content-neutral and was, therefore, unconstitutional.

Undaunted, the Board of Selectmen proposed a neoteric amendment, Article 4, for inclusion on the next Town Meeting warrant. Article 4 provided in pertinent part:

> To see if the Town will vote to amend Chapter XIII of the Revised By-Laws of the Town of Dedham, entitled "Police Regulations" by adding a new section at the end thereof, as follows: Section *57.*
>
> Unless otherwise restricted, no holder of a license issued by the Town of Dedham, pursuant to Massachusetts General Laws, Chapter 140, Sections 177A, 181 and 183A, shall permit any activity licensed thereunder to be conducted between the hours of 1:00 a.m. and 6:00 a.m.[2]

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2. The state laws cited in Article 4 authorize municipalities, in general, to grant and revoke licenses for amusement devices, concerts, dances, exhibitions, and public shows for which an admission fee is charged.

Appendix A

The voters adopted Article 4 at a special Town Meeting held on November 6, 1989. The Attorney General approved it on February 8, 1990. On the day that Article 4 took effect, appellant sued, charging that the by-law violated its rights under both the federal and state constitutions.[3] Following pretrial discovery, Dedham successfully moved for summary judgment. *See National Amusements, Inc. v. Town of Dedham*, 846 F. Supp. 1023 (D. Mass. 1994). This appeal ensued.

II. THE SUMMARY JUDGMENT STANDARD

A federal court may grant summary judgment in a civil action "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court fleshed out this rule in a triology of cases decided in the 1985-86 term. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In general, these cases require that a party seeking summary judgment make a preliminary showing that no genuine issue of material fact exists. Once the movant has made this showing, the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue. *See Celotex*, 477 U.S. at 324.

To satisfy the criterion of trialworthiness, and thereby forestall summary judgment, an issue must be "genuine," that is, the evidence relevant to the issue, viewed in the light most

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3. Dedham agreed not to enforce the by-law against Showcase *pendente lite*. This stipulation remains in effect.

flattering to the party opposing the motion, *see Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989), must be sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side. *See Liberty Lobby*, 477 U.S. at 250; *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). Trialworthiness necessitates "more than simply show[ing] that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. As we have stated, "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve . . . ." *Mack*, 871 F.2d at 181.

Trialworthiness requires not only a "genuine" issue but also an issue that involves a "material" fact. *See Liberty Lobby*, 477 U.S. at 248. In this context, the term "material" means that a fact has the capacity to sway the outcome of the litigation under the applicable law. *See id.; see also United States v. One Parcel of Real Property, Etc. (Great Harbor Neck, New Shoreham, R.I.)*, 960 F.2d 200, 204 (1st Cir. 1992). If the facts on which the nonmovant relies are not material, or if its evidence "is not significantly probative," *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted), *brevis* disposition becomes appropriate.

An order granting summary judgment engenders plenary review. *See Pagano v. Frank*, 983 F.2d 343, 347 (1st Cir. 1993). In conducting such review, we examine the summary judgment record in the light most friendly to the summary judgment loser, and we indulge all reasonable inferences in that party's favor. *See id.* Withal, we need not credit purely conclusory allegations, indulge in rank speculation, or draw improbable inferences. *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

III. THE FIRST AMENDMENT CLAIM

The heart of appellant's case is its multifaceted claim that the municipal by-law violates the First Amendment. We turn directly to that claim (relegating appellant's related overbreadth challenge to Part IV(C), *infra*).

A. Putting First Things First.

In the context of First Amendment challenges to government regulations that burden speech, the Supreme Court has identified two differing modes of analysis, or levels of scrutiny, that may come into play. Since entertainment constitutes a form of speech, fully protected by the First Amendment, *see Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981), our initial task is to determine the appropriate level of judicial scrutiny that attaches to an analysis of Article 4. We begin this endeavor by mapping the choices and putting them into workable perspective.

Freedom of speech is among the most precious of our constitutional rights. Thus, courts have long recognized that, when governmental action places speech in special jeopardy, special protections must apply. For this reason, a court embarking on an inquiry into the constitutionality of governmental action will devote "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content." *Turner Broadcasting Sys. Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994); *accord Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Strict scrutiny is desirable in these circumstances because such laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or

information or manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting,* 114 S. Ct. at 2458. Courts therefore treat content-based regulations as "presumptively invalid" under the First Amendment. *R.A.V. v. City of St. Paul,* 112 S. Ct. 2538, 2542 (1992).

In contrast, regulations that burden speech, but that are unrelated to the speaker's viewpoint or to the content of the proscribed speech, are subject to a less taxing (but nonetheless meaningful) level of judicial scrutiny. This disparate treatment is justified because, on the whole, non-content-based regulations pose "a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broadcasting,* 114 S. Ct. at 2459. Phrased another way, since regulations that are not content-based portend less jeopardy for freedom of speech, the special prophylaxis that strict scrutiny ensures is less necessary.

This dichotomy has important practical ramifications for constitutional analysis as the applicable indices of constitutionality vary according to the level of scrutiny that attaches. Strict judicial scrutiny makes it less likely that any given regulation will clear the constitutional hurdle for, in its domain, the operative test is whether a regulation "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 231 (1987). Under ordinary First Amendment scrutiny — sometimes called "intermediate" scrutiny in recognition of the fact that *all* First Amendment scrutiny is more demanding than the "rational basis" standard that is often used to gauge the constitutionality of economic regulations, *see Turner Broadcasting,* 114 S. Ct. at 2458; *see also Madsen v. Women's Health Ctr., Inc.,* 114 S. Ct. 2516, 2537 (1994) (Scalia, J., concurring in part and dissenting in part) — the test is less

exacting in both the "ends" and "means" segments of the equation. Thus, where intermediate scrutiny pertains, restrictions on the time, place, or manner of protected expression "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984).

B. Identifying the Level of Scrutiny.

In light of these differing analytic modalities, it is unsurprising that many First Amendment battles over the constitutionality of government regulations start with a debate about what level of scrutiny is appropriate. The instant case is no exception. Here, appellant advances two main theses in support of its exhortation that Dedham's by-law must be subjected to strict scrutiny. First, it maintains that Article 4 is content-based. Second, it maintains that Article 4 impermissibly singles out, and thus targets, Showcase's exhibition of midnight movies. Neither thesis merits a passing grade.

1. Relationship to Content. Appellant's flagship claim portrays Article 4 as a content-based regulation. If sustainable, this characterization would require us to employ the most exacting scrutiny in evaluating the by-law's constitutionality. *See, e.g., Simon & Schuster,* 112 S. Ct. at 508. Be that as it may, we do not think that the characterization is apt.

The concept of what constitutes a content-based as opposed to a content-neutral regulation has proven protean in practice. The Court's cases teach that the "principal inquiry in determining

content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). Even a regulation that does not choose sides or otherwise convey disapproval of a particular message can run afoul of this dictate because the "First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980); *accord Simon & Schuster*, 112 S. Ct. at 509. This does not mean, however, that the sovereign must steer away from content at all costs, or else risk strict scrutiny. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

The subject of our inquiry here seems at first blush to be the very model of a content-neutral regulation. Article 4, by its terms, does not demand reference to the content of the affected speech in order to determine if the ordinance applies; the only requisite reference is to an external characteristic: whether the activity is licensed under one of several particular sections of state law. Furthermore, nothing in the record suggests that Article 4 arose out of an effort to suppress some particular message communicated through Showcase's selection of motion pictures. In all events, any such forensic fizgig would be easily defused, because the midnight movies comprise exactly the same fare that appellant displays during the hours when the theater's operation is totally unaffected by Article 4.

Faced with so formidable a set of barriers, appellant hems and haws. In the end, it theorizes that Article 4 is content-based

because, while banning licensed activity in the early morning hours, the by-law leaves untouched other forms of expression, say, unlicensed entertainment, street demonstrations, public speeches, and candlelight vigils. In appellant's view, this distinction is driven by a value judgment — the town's conscious decision to place less worth on licensed entertainment than on unlicensed entertainment — and thus constitutes irrational discrimination between the secondary effects of prohibited and permitted forms of expression based solely on the charge of an admission fee." Appellant's Brief at 26.

As authority for this bold proposition, appellant cites *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). We do not believe that the case can carry the cargo that appellant piles upon it. In *Discovery Network*, a city, motivated by interests in both safety and aesthetics, imposed a categorical ban on the distribution, via newsrack, of "commercial handbills," but allowed the continued distribution of "newspapers" (containing primarily noncommercial speech). *Id.* at 1507-09. This policy clearly favored noncommercial speech over commercial speech, and, under it, "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack." *Id.* at 1516. On that understanding, the Court found the ban to be content-based. *See id.* at 1516-17. In so holding, the Justices, though acknowledging that the city had a legitimate interest in limiting the number of newsracks, gave short shrift to Cincinnati's suggestion that the regulation was content-neutral because it was born of a desire to combat certain distasteful secondary effects associated with newsracks. The Court contrasted the case with *Renton*, explaining that Cincinnati had failed to identify any "secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." *Id.* at 1517.

Appendix A

Appellant's reliance on *Discovery Network* is mislaid. Whether Cincinnati's regulation applied to a particular newsrack was determined by necessary reference to the subject matter of the specific publications contained therein — a telltale harbinger of content-based regulation. Dedham's regulation is not of this ilk; Article 4 applies without reference to either the content of the entertainment or the communicative impact of any speech. Unlike in *Discovery Network*, the applicability determination is based solely on an external, content-neutral characteristic — the existence of an admission fee.

To rub salt in an open wound, appellant not only misapprehends the import of *Discovery Network*, but also overreads the Court's opinion. The case does not stand for the sweeping proposition that *any* differential treatment of speakers renders a regulation content-based. Instead, the Court's holding pivots on the conclusion that, though the city's underlying purpose in enacting the ordinance was proper, the differential treatment of speakers had no relationship to that underlying purpose.[4] *See id.* at 1517. Thus, *Discovery Network* establishes a much narrower proposition: that, even when a municipality passes an ordinance aimed solely at the secondary effects of protected speech (rather than at speech *per se* the ordinance may nevertheless be deemed content-based if the municipality differentiates between speakers *for reasons unrelated to the legitimate interest that prompted the regulation. Cf. Carey v. Brown*, 447 U.S. 455, 465 (1980) (sustaining challenge to statute permitting labor, but not nonlabor, picketing because "nothing in the content-based labor-nonlabor distinction ha[d] any bearing" on the state's legitimate interest in privacy).

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4. In this regard, it is interesting that, as applied, the regulation outlawed only 62 newsracks while permitting over 1,500 others to remain in service. *See Discovery Network*, 113 S. Ct. at 1510.

Here, Dedham's stated interest in enacting Article 4 is, and has been, to reduce the number of sources of potential noise and disturbance.[5] Such an objective is plainly within the office of municipal government. Accordingly, the relevant question reduces to whether Dedham has offered a neutral justification for the differential treatment that Article 4 accords to purveyors of licensed entertainment, on the one hand, and purveyors of unlicensed entertainment, on the other hand. On the facts of this case, the question requires us to ascertain whether there are any secondary effects attributable to licensed (commercial) amusements that distinguish them from the unlicensed (noncommercial) amusements that Dedham has left unregulated. *See Discovery Network*, 113 S. Ct. at 1517.

We answered the same question in a slightly different setting in *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981). There, several adult bookstores challenged the constitutionality of a municipal licensing ordinance (enacted pursuant to Mass. Gen. L. ch. 140, § 181. A statute referenced in Dedham's amended by-law, on the ground, *inter alia*, that the ordinance treated commercial and noncommercial amusements differently. In response, we rejected

> appellant's argument that the statute and the ordinance are facially under inclusive by reason of their failure to subject non-commercial amusements to the same licensing requirements. We think a legislature could reasonably conclude that non-commercial amusements present sufficiently

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5. We discuss appellant's claim that Dedham's stated interest is illusory and/or pretextual in Part III(C)(1), *infra*.

> less likelihood of the harms sought to be prevented to justify their differential treatment.

Fantasy Book Shop, 652 F.2d at 1121 n.6 (offering examples).

In the case at bar, we think it self-evident that a legislative body might reasonably conclude that the frequency and regularity of activity inherent in an ongoing commercial venture heighten the probability of late-night disruptions and boost the number of likely participants. The profit motive itself, which encourages marketing and promotion aimed at increased consumption, is the surest indicator that, where commercial amusements operate, crowds will probably gather. Hence, the distinction drawn by Dedham between licensed and unlicensed entertainment bears a rational relationship to the specific interests cited by it in enacting Article 4. It follows inexorably that, notwithstanding the differential treatment that the by-law gives to unlicensed as opposed to licensed entertainment, it cannot successfully be condemned as content-based.

2. Targeting. Warbling from a different perch appellant asservates that Article 4 should be strictly scrutinized because it singles out, and in that sense targets, Showcase's midnight movies. This asseveration rests on the notion that strict scrutiny is *always* justified when a municipality enacts an ordinance that, in practical effect, regulates the First Amendment rights of a select group. We consider the notion misguided.

In mounting its "targeting" offensive, appellant relies primarily on *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). In *Minneapolis Star*, the Court struck down a state use tax on newsprint and ink, ruling

that the tax violated the First Amendment both because it "singled out the press for special treatment" by taxing newspapers in a manner "without parallel in the State's tax scheme," *id.* at 582, and because it impermissibly "target[ed] a small group of newspapers" within the press as a whole, *id.* at 591.[6] In reaching this result, the Court consigned the Minnesota statute to strict scrutiny, reasoning:

> When the State singles out the press, . . . the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press. . . .

Id. at 585. The Court added that "differential treatment, unless justified by some special characteristic of the press suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.*

Before attempting to transplant the teachings of *Minneapolis Star*, it is important to recall that, in a later case, the Court revisited the matter of differential taxation. *See Leathers v. Medlock*, 499 U.S. 439 (1991). There, the Court ruled that Arkansas could extend its generally applicable sales tax to cable television and satellite services, while exempting print media, without offending the First Amendment. The Court refined the

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6. Because the Minnesota tax exempted the first $100,000 worth of newsprint and ink used annually by each publisher, its burden fell almost exclusively on large newspapers.

analysis it had crafted in *Minneapolis Star*, explaining that targeting engenders strict scrutiny only when regulations (1) single out the press, (2) take aim at a small group of speakers, or (3) discriminate on the basis of the content of protected speech. *Id.* at 447. Because the Arkansas tax measure avoided these pitfalls — for example, there was "no indication" that Arkansas "targeted cable television in a purposeful attempt to interfere with . . . First Amendment activities," *id.* at 448 — the Court concluded that the statute did not warrant strict scrutiny.

It is incumbent upon us to inspect this case through the precedential prism of *Minneapolis Star* and *Leathers*. Reduced to bare essence, appellant's argument for strict scrutiny based on targeting necessarily rises or falls on the second of the three criteria identified by the *Leathers* Court. We believe it falls, for Article 4 does not target Showcase either as a speaker or as a business.

By its terms, Article 4's proscription on activity between 1:00 a.m. and 6:00 a.m. applies to a myriad of other First Amendment speakers, such as persons who from time to time may hold licenses for concerts, dances, or plays. And, moreover, First Amendment speakers are not the only businesses prohibited from late-night operation in Dedham; there is substantial evidence in the record to support the town's contention that the disputed by-law is simply the latest in a progression of by-laws designed to ensure that commercial activities do not impinge unduly on private, residential life.[7] In this respect, Article 4 is

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7. For example, Section 42 of the town's revised by-laws, as amended in 1976, prohibits individuals from selling food at retail between 12:00 midnight and 6:00 a.m. Section 42A, added to the by-laws in 1976 and thereafter revised slightly in 1979, proscribes the sale of virtually all retail commodities except fuel products

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more akin to the tax in *Leathers* — an impost that the Court upheld because it was an extension of a generally applicable tax, 499 U.S. at 447 — than to the tax in *Minneapolis Star* — an impost that the Court struck down because it was "without parallel in the State's tax scheme," 460 U.S. at 582.

To cinch matters, appellant's targeting argument also flies in the teeth of the secondary effects doctrine. Under appellant's formulation, any regulation that has an effect on fewer than all First Amendment speakers or messages could be deemed to be a form of targeting and thus subjected to strict scrutiny. Yet the Supreme Court has recognized that a municipality lawfully may enact a regulation that "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

Even appellant's most vaunted precedent does not support its targeting argument. In *Minneapolis Star*, the Court did not condemn all regulations that single out First Amendment speakers for differential treatment; rather, the Court acknowledged that certain forms of differential treatment may be "justified by some special characteristic" of the regulated speaker. 460 U.S. at 585. Secondary effects can comprise a special characteristic of a particular speaker or group of speakers. Accordingly, the language we have quoted from *Minneapolis Star* comfortably accommodates an exception to the prohibition on differential treatment for regulations aimed at secondary

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between 12:00 midnight and 6:00 a.m. Dedham also has adopted a by-law forbidding the illumination of signs for retail establishments during the same six-hour interval.

effects, so long as the disparity is reasonably related to a legitimate governmental interest.[8]

In sum, appellant's targeting argument, like its argument about content quality, fails to furnish a cognizable basis for invoking strict scrutiny. We, therefore, apply an intermediate level of scrutiny in considering the constitutionality of Article 4.

C. Applying Intermediate Scrutiny.

Strict scrutiny aside, restrictions on the time, place, and manner of protected expression — and Article 4 plainly qualifies as such a restriction — should be upheld so long as they are content neutral, closely tailored to serve a significant governmental interest, and allow for reasonable alternative channels of communication. *See Renton*, 475 U.S. at 50; *Clark*, 468 U.S. at 293. Appellant says that Article 4 fails to satisfy any of these three criteria. We do not agree.

1. Governmental Interest. Dedham maintains that the voters enacted Article 4 to "preserve peace and tranquility for Town citizens during the late evening hours." Such an interest, in the abstract, suffices to justify a content-neutral restriction on protected speech (so long as other requirements are met). No less

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8. Appellant's continued insistence that Article 4 unlawfully targets Showcase because it was conceived in response to complaints about disruptions incident to the midnight movies reflects a distorted view both of the secondary effects doctrine and of how a representative democracy functions. An ordinance is not called into constitutional question because its enactment is prompted by non-speech-related concerns (*e.g.*, crime, traffic, noise) stemming from the activity of a specific entity. So here: it works no constitutional insult that the community's concerns about the midnight movies acted as a catalyst that spurred the passage of a generally applicable regulation.

an authority than the Supreme Court has observed that government's "interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey*, 447 U.S. at 471.

Appellant concedes that theoretical validity of the town's interest in preserving peace and tranquility, but insists that the record evinces a genuine question as to whether Dedham's articulated concerns, such as noise, crime, and litter, are founded in fact. Going a step further, appellant also contends that Dedham's asserted interest is pretextual and that a race-based animus, instead of a desire to promote serenity, motivated the adoption of the by-law. The record fails to bear out either of these claims.

a.

As an initial matter, appellant asserts that Dedham's professed governmental interest is not substantial because exhibiting midnight movies did not adversely affect the peacefulness of the community, and, therefore, the secondary effects at which Article 4 is aimed are illusory. We agree with appellant's premise: a governmental interest woven exclusively out of the gossamer threads of speculation and surmise cannot be termed substantial. However, we disavow appellant's conclusion: the record before us consists of sturdier stuff and tells a story that strongly supports Dedham's stated purpose. We canvass certain key pieces of evidence.

Before Article 4 was more than a gleam in its sponsors' eyes, numerous citizens had complained about vandalism, trespassing, noise, and late-night traffic through residential neighborhoods (with accompanying disruption from headlight glare). On

Appendix A

January 19, 1989, Selectman Hoell emphasized at a selectmen's meeting "his concern and the concern of the neighbors in the area of the Cinema regarding incidents at the Cinema during and after the late showings on weekends." At the same meeting, Selectman Kehoe noted that she had "received calls from residents" complaining about "many incidents" at the site, and the police chief Dennis Teehan, reported to the selectmen that "[t]here have been numerous incidents happening in the area . . . after the midnight shows let out." At the February 2 selectmen's meeting, several residents, including John Birda, Bob Zieman, and John Howard, complained that appellant's late-night operations resulted in disruptions, such as noise in the vicinity of a nearby bus stop. Additionally, appellant acknowledged in the district court that, between February 2 and April 6, its representatives "met with . . . Dedham residents on five separate occasions," and that, during these meetings, it "proposed and developed plans to alleviate any articulated concerns pertaining to traffic, noise and security at or around the Showcase Cinemas complex." Appellant's Complaint, ¶ 10. Appellant then put these plans (including, for example, a beefed-up police presence, added patrols, and a litter-removal program) into effect at its expense — thus lending a patina of plausibility to the complaints. Robert Cedrone, chairman of the Poor Farm Committee, a neighborhood alliance, capsulized the situation, describing it in the following terms at the April 24 Town Meeting:

> [There are] more people coming out of the late show cutting through the neighborhood, cutting through back yards. The elderly people still can't get used to that, even with the extra police protection . . . . The people in this neighborhood got to go to sleep . . . . They're sleeping on eggs out there.

Appellant attempts to brush aside these remonstrances. Based on information developed through an in-depth investigation conducted in the course of litigation (and, therefore, well after the fact), it argued that the residents' complaints proved to be phantoms and that therefore Dedham failed to carry its burden of establishing that Article 4 actually serves a substantial governmental interest. In advancing this proposition, appellant in effect argues that a municipality cannot credit complaints and other evidence related to past problems with a particular activity or enterprise unless and until it conducts an independent investigation and corroborates each incident. We do not believe that local legislatures are so constrained.

A legislative body can act without first acquiring irrefutable proof. In other words, lawmakers need not bury each piece of described trash before acting to combat litter, or confirm each honking horn before acting to abate noise levels. Instead, a legislative body, acting in furtherance of the public interest, is entitled to rely on whatever evidence it "reasonably believe[s] to be relevant to the problem" at hand. *Renton*, 475 U.S. 51-52.[9]

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9. Appellant reads *Renton* with an astigmatism bred of self-interest. To be sure, as appellant suggests, the Ninth Circuit initially found the city's stated justifications for the ordinance to be speculative because the city enacted it without the benefit of any studies relating to the city's "particular problems or needs." *Renton*, 475 U.S. at 50 (citation omitted). But the Supreme Court determined that the Ninth Circuit had "imposed on the city an unnecessarily rigid burden of proof," *id.*, reasoning that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses," *id.* at 51-52. To the extent it is relevant here, *Renton* stands for the proposition that a municipality may rely upon the experience of other communities in assessing, and then addressing, particular problems. It neither holds nor suggests that a city is

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Here, it seems pellucid that, in addressing problems of crime, litter, and noise posed by late-night commercial entertainment activities, Dedham had ample reason to assume that the collocation of factors on display at the Town Meeting — recurrent, wide-ranging complaints lodged by residents, constabulary concern with a pattern of incidents reasonably believed to have occurred in connection with the exhibition of midnight movies, and a common sense realization that the placidity of a residential community will be jeopardized by an activity that regularly draws hundreds of late-night patrons, most in automobiles, who must then depart in the early morning hours — were relevant to, and probative of, its assessment of the problem.[10] Consequently, we reject appellant's contention that Dedham's asserted governmental interest is a phantom.

b.

In addition to attacking the credibility of the town's anecdotal evidence, appellant asserts that Article 4's "ulterior purpose is to keep African Americans out of Dedham. . . ." Appellant's Brief at 39. This is a serious charge — and we treat it as such. Having scoured the record, we agree with the district court that the allegations stands unproven.

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debarred from using *its own experiences* for the same purpose. *See Ward*, 491 U.S. at 800 (holding that a city's substantial interest in limiting sound volume was satisfactorily "evidenced by the complaints about excessive volume generated by respondent's past concerts").

10. In respect to governmental interest, the material fact is whether Dedham had adequate reason to act upon its stated concerns, not, as appellant would have it, whether Dedham's concerns were well-founded. As to the former, the evidence is overwhelming. Hence, the lower court appropriately granted summary judgment on this issue.

Appendix A

In support of the accusation, appellant relies principally upon a survey purporting to demonstrate that the audience composition for Showcase's midnight movies is approximately 80% African-American as contrasted with an audience composition of approximately 30% African-American for other screenings. Appellant buttressed the survey results with the affidavit of the theater manager, Anthony Pungitore, to the effect that midnight movie audiences have been "predominantly" African-American, at least since 1986. The district court articulated an abiding concern about the relevance and validity of the survey evidence,[11] but eventually accepted it *arguendo* for summary judgment purposes as probative of "the racial mix of Showcase audiences." *National Amusements,* 846 F. Supp. at 1028. Nevertheless, the district court found the record "devoid of evidence that race played a role in the decision to adopt the By-law." *Id.* We reach the same conclusion.

Even accepting appellant's assertion as to the racial composition of the midnight movie audiences, appellant has not linked that fact to the municipal decisionmaking process. That is to say, appellant cites no evidence that any person involved in the passage of Article 4 was aware *at that time* of the racial composition of Showcase's audiences. This omission is fatal to a claim of intentional racial discrimination. *See Washington v. Davis,* 426 U.S. 229, 240 (1976), (elucidating "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"); *Village of Arlington Heights v.*

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11. The survey results were tabulated by a market research firm that appellant engaged for several weeks in the summer of 1993 (three years after the Town Meeting enacted Article 4). The surveyors noted theatergoers' races, and asked a representative sampling of midnight movie patrons, of all races, why each individual chose to attend the late show.

Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977) (similar; rejecting claim that municipality's zoning decision was racially discriminatory); *cf. Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (explaining that the requirement of discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon on an identifiable group").

Appellant labors valiantly to fill this void, citing statements from various selectmen and town meeting members that are, to appellant's way of thinking, code words demonstrating "institutional racism." Appellant's Brief at 41. Typical of these comments are Selectman Kehoe's reference to "these young kids, who don't even live in Dedham," and Selectman Hoell's references to "nice little out-of-towners" and "the undesirable element that's attracted by [Showcase's] activity." But these statements, if viewed in the most cynical light, are at worst ambiguous. Standing alone, they are insufficient to raise an inference of racial animus. The record chronicles the lengthy series of events incident to the town's consideration of Article 4, and does not contain the slightest indication that the race of theatergoers was an issue. To the contrary, all the evidence supports Dedham's assertion that Article 4 was aimed principally at curbing late-night disruptions. Against this backdrop, the snipets that appellant has extracted from the record with near-surgical precision simply do not support an inference of racism on the part of the legislative body.

While the summary judgment mantra requires us to draw every reasonable inference in favor of the nonmoving party, inferences, to qualify, must flow rationally from the underlying facts; that is, a suggested inference must ascend to what common

sense and human experience indicates is an acceptable level of probability. *Cf. Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 16 (1st Cir. 1989). This means, of course, that a court pondering a Rule 56 motion need not embrace inferences that are wildly improbable or that rely on "tenuous insinuation." *Mesnick v. General Elec. Co.*, 950 F.2d 816, 826 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2965 (1992).

This principle is dispositive of appellant's claim of racial discrimination. While ambiguous remarks may, under some circumstances, help to illuminate the summary judgment record, such remarks rarely will suffice to conceive an issue of material fact when none otherwise exists.[12] As we stated in *Mesnick*, a court is not under an obligation "to draw unreasonably speculative inferences in mulling whether the plaintiff fulfilled his burden of adducing 'specific facts showing that there is a genuine issue for trial.' " *Id.* (quoting *Liberty Lobby*, 477 U.S. at 256). It follows that, "[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory

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12. On this point, case law in the age discrimination context is instructive. In that milieu, courts frequently have ruled that ambiguous remarks, without more, are not enough to raise an inference of an employer's discriminatory intent. *See, e.g., Thomure v. Phillips Furniture Co.*, 30 F.3d 1020, 1025 (8th Cir. 1994) (employer's suggestion to employee that he "might want to consider retirement" rather than accept a pay cut found not probative of age discrimination); *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 481 (1st Cir. 1993) (supervisor's statement that company sheltered "no sacred cows" insufficient to raise inference of age discrimination); *Mesnick*, 950 F.2d at 826 (supervisor's comment that he was "sad to lose the youth of the work force" did not, by itself, raise an inference of bias against older employees); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990) (affirming summary judgment for employer despite supervisor's comment that he chose plaintiff's replacement because the latter was "a bright, intelligent, knowledgeable young man").

allegations, improbable inferences, and unsupported speculation." *Medina-Munoz,* 896 F.2d at 8; *see also Manego v. Cape Cod Five Cents Sav. Bank,* 692 F.2d 174, 177 (1st Cir. 1982) (recognizing that, at the summary judgment stage, "smoke alone is not enough to force the defendants to a trial to prove that their actions were not [racially] discriminatory"; a plaintiff must at least identify "some glowing embers"). So here: asking a court to infer, based on nothing more than the uncommunicated existence of a predominantly African-American theater audience and a handful of arguably ambiguous statements, that a deliberative body of several hundred members acted out of a race-based animus in passing a facially neutral law is simply too much of a stretch.

Because courts occupy a special place in our democracy they must be especially careful not to succumb to the merchants of conjecture. Consequently, they must deal in facts as opposed to suspicions, and in plausible inferences as opposed to speculative suppositions. Fidelity to this ideal constrains us to rebuff appellant's postulatory claim that racial animosity paved the way for Article 4's passage. The record reflects no trialworthy dispute on this issue.

2. ***Narrow Tailoring.*** Appellant complains that Article 4 is not narrowly tailored because it affects *all* licensed entertainment, irrespective of any individualized impact on crime, noise, traffic, or trash. The irony of this position is not lost upon us: appellant seemingly demands in this breath that Article 4 be limited to Showcase Cinemas because the relevant secondary effects have been linked predominantly to that entity, yet in an earlier breath denounced such a focus as impermissible targeting, *see supra* Part III(B)(2). We reject this anfractuous effort to trap Dedham between the Scylla of narrow tailoring and the Charybdis of targeting.

Appendix A

In *Ward*, the Court explained that the narrow tailoring requirement does not mandate a least restrictive means analysis; "[r]ather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (internal quotation omitted). Article 4 meets that test: it promotes the substantial government interest or preserving tranquility — an interest that, as Dedham's past experience demonstrates, would not be achieved as effectively absent the regulation. Nor is the regulation rendered infirm by its general applicability to all licensed entertainment. It is within a legislature's legitimate purview to conclude that such secondary effects as late-night noise and traffic are likely to adhere to *all* commercial entertainment. Indeed, the very existence of a licensing scheme, with its built-in emphasis on commercial amusements, supports Dedham's decision to enact a generally applicable regulation. *See, e.g., Fantasy Book Shop*, 652 F.2d at 1121 n.6 (explaining that a legislature may regulate licensed entertainment based on a reasonable likelihood that patrons would create "excessive noise" or engage in "disruptive or illegal conduct").

3. ***Alternate Avenues of Communication.*** Appellant's contention that Article 4 is invalid because it does not allow for "ample alternative channels for communication of the information," *Clark*, 468 U.S. at 293, need not detain us. The record conclusively demonstrates that adequate alternatives exist allowing appellant to communicate, and audiences to receive, the message contained in the midnight movies. The ban on licensed entertainment affects only five hours out of each 24-hour day, leaving appellant 19 hours (or roughly 80% of each day) in which to communicate its cinematic message. Indeed, the very same films that can no longer be exhibited between 1:00 a.m. and 6:00

a.m. will still be shown an average of six times a day on Fridays and Saturdays, and will be exhibited for roughly 13 hours a day on the other five days of the week.

Appellant readily acknowledges the frequency of its exhibitions, but nonetheless argues that the ban on midnight movies forecloses the opportunity to communicate its message to a distinct segment of the movie-going public. To bolster this argument, it again retreats to its survey. The survey results indicate that, out of a random sampling of midnight moviegoers, 14% said that they attended late shows because they "had to work late, and could only come to a late show," and 11% "felt that the midnight show was the only entertainment option open to him/her." From these somewhat inscrutable results, appellant's market research firm concluded that:

> The late [midnight] show is the only opportunity that the Theater has to exhibit films in order to communicate with a distinct portion of its patrons. Showing films earlier in the day is not a viable means of communication with this segment, because, as indicated by the survey results, these patrons are extremely unlikely and/or unable to attend earlier shows.

There are a slew of problems with the appellant's analysis. First, the survey is not particularly informative because it focuses on the patrons' option *on one particular night.*[13] Thus, patrons

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13. For example, Question No. 2 asked: "Why did you come to the 'Midnight Show' *tonight*?" (emphasis supplied). Similarly, Question No. 3 asked: "If you couldn't get into the movies *tonight*, what other entertainment options would you have?" (emphasis supplied).

who identified the midnight movies as their "only entertainment option" or who said they "could only come to a late show" may well have been confining their answers to one specific evening. Questions of more general applicability were conspicuously lacking. Hence, the wording of the survey defeats appellant's attempted reliance on it.

Second, it is reasonable to assume that midnight movies are commercially successful because some people *prefer* to attend them. Yet, thwarting such an idiosyncratic preference cannot be equated with a denial of adequate avenues of communication. Although Article 4 diminishes the total quantity of appellant's speech in some measure, and simultaneously curtails its opportunity to communicate with some patrons, those are necessary side effects of almost any restriction on speech. As long as restrictions are content-neutral, some diminution in the overall quantity of speech will be tolerated. *See, e.g., City of Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 803, 812 (1984) (finding ample alternative avenues of communication despite assumption that the ordinance "diminishe[d] the total quantity" of appellees' speech).

In short, the lens of inquiry must focus not on whether a degree of curtailment exists, but on whether the remaining communicative avenues are adequate. As the Court phrased it: "That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." *Ward,* 491 U.S. at 802. Given 19 hours a day within which to exhibit movies, with no special limitations on content, appellant's evidence does not call into legitimate question the adequacy of the alternate routes for communication.

D. *Recapitulation.*

To recapitulate, Dedham has demonstrated, in conformity with the protocol of Rule 56, that Article 4 escapes strict scrutiny. Dedham has also demonstrated that Article 4 survives the lesser degree of scrutiny that obtains here. The municipal by-law is designed to serve a substantial governmental interest, it is narrowly tailored in the service of that interest, and it leaves open ample avenues of communication. Therefore, the district court did not err in granting *brevis* disposition on appellant's ingenious collection of First Amendment initiatives.

IV. MISCELLANEOUS CLAIMS

Appellant makes several additional claims, one under the Due Process Clause of the United States Constitution, one intimating, albeit somewhat obliquely, that Article 4 places an unconstitutional condition on appellant's entertainment license, one involving overbreadth, and the last under Article 16 of the Declaration of Rights contained in the Massachusetts Constitution. These claims lack force.[14]

A. *The Due Process Claim*

Appellant maintains that Dedham did not afford it

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14. Appellant also hints at a claim under the Takings Clause, presumably on the theory that Dedham took its "valuable interests in exhibiting midnight movies" without just compensation. Appellant's Brief at 45. We do not probe the point for appellant, by devoting a mere two sentences to the possibility in its briefs, waived any such claim. *See, e.g., Ryan v. Royal Ins. Co.*, 916 F.2d 731, 734 (1st Cir. 1990) ("It is settled in this circuit that issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned.").

procedural due process in adopting Article 4. Its rhetoric rings hollow.

As an initial matter, we doubt that the concept of procedural due process is applicable in respect to the legislative enactment of a generally applicable statute or ordinance. After all, procedural due process is a doctrine most closely associated with assuring fairness in regard to the enforcement of laws or the administration of programs. In general, then, the doctrine bears no relation to the initial enactment of a law. *See* Laurence H. Tribe, *American Constitutional Law* 664 (2d ed. 1988). Indeed, the prospect of a legislative body being required to afford a panoply of protections for all persons who might arguably be affected by a forthcoming statute or ordinance would seem to be a prescription for parliamentary paralysis.

In reaching this conclusion, we follow guideposts erected by the Supreme Court. We find particularly instructive the Court's opinion in *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), a case that arose after the Colorado Board of Equalization promulgated a county-wide increase in property valuations for tax purposes. The petitioner there adopted much the same position that appellant advocates here. Thus, the Court had to decide "whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned." *Id.* at 445. Justice Holmes, writing for a unanimous Court, after noting that it was "hard to believe that the proposition was seriously made," *id.*, rejected the due process requirement hawked by the petitioner:

> Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . .

> General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Id. In language that we find appropriate to our case, Justice Holmes concluded: "There must be a limit to individual argument in such matters if government is to go on." *Id.*

Appellant simply ignores this line of authority. It concentrates instead on the fact that the by-law curtailed its licensed exhibition of films, and tries to argue that the curtailment entitled it to the same due process guarantees as would have obtained had Dedham revoked its entertainment license altogether. This is an exercise in sophism that fails for at least two reasons. In the first place, the by-law did not constitute a revocation of the license. In the second place, the record makes manifest that the town afforded appellant both notice and an opportunity to be heard.

Appellant cites *Derby Refining Co. v. Board of Aldermen*, 555 N.E.2d 584 (Mass. 1990), for the proposition that Dedham could not lawfully enact Article 4 without first according it a full-scale adjudicatory hearing. Appellant misreads the opinion. In *Derby Refining*, the state court held that certain types of licenses, once issued, "become[] a vested property right of the licensee, and may be revoked only when due process protections are complied with." *Id.* at 722. Assuming for the sake of argument that appellant has a cognizable property interest in its license to

exhibit motion pictures, *but cf. Roslindale Motor Sales, Inc. v. Police Comm'r,* 538 N.E.2d 312, 314-15 (Mass. 1989) (holding that motor vehicle dealer did not have a property interest in license to deal in used cars), *Derby Refining* is nonetheless inapposite because the enactment of Article 4 cannot be considered a *revocation* of that license. Unlike the revocation of a license — which results in the total cessation of previously authorized activities — Article 4 does not snatch away appellant's right to conduct the authorized activities, but merely cuts back the hours during which those activities may be undertaken. The entertainment license remains intact.

Appellant's argument also founders because, in this instance, the town afforded process equivalent to that which would have been due at a revocation hearing. The Town Meeting originally passed Article 40, Article 4's progenitor, in the spring of 1989. Before putting Article 40 to a vote, town officials contacted appellant to discuss the residents' concerns. Various meetings were held. On April 10, Pungitore, the theater manager, attended the Town Meeting and was given an opportunity to speak. The desirability of the ban was reconsidered by the Town Meeting on April 24 for the express purpose of "hear[ing] the proponents and opponents of [the by-law]," and to "give a fair chance to the businessmen of the community to put their side of the story forward." During the ensuing debate, Towey, a senior officer of National Amusements, spoke at considerable length against the proposal. Later after the Attorney General sidetracked Article 40, appellant received much the same sort of process in respect to Article 4. For example, Towey attended the November 6, 1989 Town Meeting at which Article 4 was put to a vote, participated fully in the discourse, and delivered a lengthy speech urging rejection of Article 4. No more is exigible.[15]

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15. Appellant bemoans the lack of particular forensic devices, such as cross-

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Appendix A

B. *The "Unconstitutional Condition" Claim.*

To the extent appellant suggests that Article 4 places an unconstitutional condition on its entertainment license, the suggestion is without merit. The doctrine of unconstitutional conditions bars government from arbitrarily conditioning the grant of a benefit on the surrender of a constitutional right, regardless of the fact that the government appropriately might have refused to grant the benefit at all. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions,* 103 Harv. L. Rev. 1413, 1415 (1989).

Not all conditions are prohibited, however; if a condition is germane — that is, if the condition is sufficiently related to the benefit — then it may validly be imposed. In the final analysis, "the legitimacy of a government proposal depends on the degree of relatedness between the condition on a benefit and the reasons why government may withhold the benefit altogether." *Id.* at 1457 (footnote omitted); *see also Posadas de P.R. Assoc. v. Tourism Co.,* 478 U.S. 328, 345-46 (1986) (upholding Puerto Rico's ban on advertising casino gambling to Puerto Rico residents because "the greater power to completely ban casino gambling necessarily includes the lesser power" to discourage gambling through the prohibition on advertising). "The more germane a condition to a benefit, the more deferential the review; nongermane conditions, in contrast, are suspect." Sullivan, *supra,* at 1457.

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examination. But even in license revocation proceedings proper, such accouterments are not constitutionally required. *See, e.g., Chongris v. Board of Appeals,* 811 F.2d 36, 41-42 (1st Cir.) (holding that revocation of building permit without affording applicants an opportunity to cross-question witnesses is not a denial of procedural due process), *cert. denied,* 483 U.S. 1021 (1987).

In this instance, Article 4 easily satisfies the requirement of germaneness. Dedham's power to license entertainment as a means of protecting public health and welfare is closely related to the core purpose of Article 4, which, as we have said, is to preserve the nighttime tranquility of the community. Thus, while the ban on licensed entertainment between 1:00 a.m. and 6:00 a.m. may constitute a condition on appellant's license, it is germane and, therefore, not an unconstitutional condition.

C. ***The Overbreadth Claim.***

Appellant attempts to recast its "narrow tailoring" argument, *see supra* Part III(C)(2), as an overbreadth attack. It charges that Article 4 is overbroad because it curtails *all* licensed entertainment, including entertainment that does not produce unwelcome secondary effects. The challenge is baseless.

To be sure, appellant attempts to assert the rights of others but neither standing nor principles of *jus tertii* pose an insuperable obstacle. First Amendment overbreadth doctrine permits "an individual whose own speech or conduct may be prohibited . . . to challenge a statute on its face because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (internal quotation omitted). The Supreme Court has limited the sweep of the overbreadth doctrine by imposing "[t]he requirement that the overbreadth be substantial." *Id.; see also Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Consequently, a "facial" overbreadth challenge will not succeed unless "there [is] a realistic danger that the statute itself will significantly compromise recognized

First Amendment protections of parties not before the Court. . . ." *Taxpayers for Vincent*, 466 U.S. at 801.

Here, appellant has failed to demonstrate that Article 4 is overbroad, let alone substantially so. Dedham's preoccupation with licensed entertainment bears a rational relationship to its stated interests, *see supra* Part III(B)(1), and appellant has cited no examples of other licensees who have been harmed by the by-law despite the absence of secondary effects. That ends the matter. Although Dedham likely would have created overbreadth concerns had it attempted to ban *all* First Amendment activity between 1:00 a.m. and 6:00 a.m., *cf. Jews For Jesus*, 482 U.S. at 570-71, it did not take so bold a step. Rather, Dedham chose a safer path by focusing on those activities — commercial entertainment — most likely to result in late-night disruptions. The claim of invalidity must, therefore, perish.

D. *The State Constitutional Claim.*

Appellant's complaint contained a claim that Dedham's by-law violated the Massachusetts Constitution. In granting summary judgment, the district court finessed the merits of the state constitutional claim. The court noted that, in presenting its arguments, appellant had not drawn any distinction between the federal and state constitutional claims,[16] and ruled, therefore, that appellant had forfeited any chance to argue that the Massachusetts Declaration of Rights offers broader freedom-of-speech protection than the cognate provisions of the First

16. Despite the fact that Dedham moved for summary judgment on all claims, appellant relied almost entirely on federal precedents in opposing the motion. Indeed, appellant only mentioned Article 16 once in its memorandum in opposition to summary judgment, citing it for the uncontroversial point that movies are a form of protected expression.

Amendment. *See National Amusements,* 846 F. Supp. at 1032 n.12.

On appeal, appellant concedes that it treated the two constitutional provisions identically in the court below, and tells us that it did so in the belief that the federal and state constitutional protections for freedom of speech were coextensive as applied to the exhibition of motion pictures. Having had second thoughts in light of the district court's holding that the by-law does not offend the First Amendment, appellant invites us to consider the omitted argument. We decline the invitation.

The short of it is that appellant's change of heart comes too late. "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. Massachusetts Inst. of Technology,* 950 F.2d 13, 22 (1st Cir. 1991) (collecting cases), *cert. denied,* 112 S. Ct. 1939 (1992). We see no reason to depart from this prudential rule in the circumstances at bar. Given the way in which appellant elected to present its case below, Judge Young acted appropriately in assuming, for purposes of his decision, that the freedom-of-speech protections found in the two constitutions were coterminous. Hence, the disputed ruling must be upheld. *See Mesnick,* 950 F.2d at 829 n.11 (holding that a plaintiff whose complaint contained parallel claims under federal and state antidiscrimination statutes, but who relied exclusively on federal precedent in unsuccessfully opposing summary judgment, could not argue on appeal that state law was more favorably disposed to his claims).

V. CONCLUSION

We need go no further.[17] For the reasons discussed above, we hold that Dedham's by-law, prohibiting the exhibition of motion pictures at the town's only theater between the hours of 1:00 a.m. and 6:00 a.m., passes First Amendment muster. In the bargain, it also survives appellant's other challenges. Accordingly, the order of the district court granting summary judgment in the town's favor must be

Affirmed.

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17. To the extent appellant has raised or alluded to other grounds for appeal, we reject them by this reference. None requires comment.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED FEBRUARY 6, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 90-10472-Y

NATIONAL AMUSEMENTS, INC.,

Plaintiff,

v.

TOWN OF DEDHAM,

Defendant.

MEMORANDUM AND ORDER

YOUNG, D.J. February 6, 1994

As the eye is the window of the soul, so too are American movies the expression of our collective psyche. Movies inform us about our lives, our history, our cultures, and those of others — and distort all four. *See* George MacDonald Fraser, *The Hollywood History of the World — From One Million Years B.C. to Apocalypse Now* (1988). They make us laugh and cry even as they exalt and cheapen our daily lives. They raise the most profound questions of our existence yet are but an ephemeral parody of reality. Above all, since the American movie industry is a business — big business — movies must entertain, and "[t]here is no doubt that entertainment . . . enjoys First Amendment

protection." *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 578 (1976). Guarding the frontier of that protection is a perennial task of America's courts. No function could be more vital.

This particular dispute pits a huge cinema complex against a Massachusetts town and requires analysis of some serious constitutional questions. The matter comes before the Court upon the motion of the Town for summary judgment and the essential facts are undisputed.

UNDISPUTED FACTS

The Plaintiff National Amusements, Inc. ("National") is a corporation organized under the laws of Maryland with its principal place of business located at 200 Elm Street in the Town of Dedham ("The Town"). National owns and operates Showcase Cinemas ("Showcase"), a theater complex consisting of twelve theaters, all of which exhibit first run movies. The Showcase is located on Route 1 in Dedham. In 1978, Showcase commenced the regular exhibition of late evening movies ("late shows") on Friday and Saturday nights. These late shows usually start between 11:30 p.m. and 12:30 a.m. and end between 1:00 a.m. and 2:30 a.m.

At a meeting of the Board of Selectmen (the "Board") for the Town of Dedham on January 12, 1989, a selectwoman voiced her concern about traffic and security problems at the Showcase parking lot and asked for a report from the police department of all incidents at that location for the past three months. A fellow selectman expressed similar concerns at the January 19, 1989 meeting of the Board. Consequently, the Board requested that the management of Showcase come before the Board to discuss the

situation. The Board also placed Article Forty on the Warrant for the annual Town Meeting. As proposed, Article Forty stated:

> ARTICLE FORTY: By the Board of Selectmen: To see if the Town will vote to amend Chapter XIII of the Town By-laws by adding the following new section:
>
> Section 42B — No holder of an entertainment license for theatrical exhibition, public show, public amusement, concert, dance or exhibition, pursuant to General Laws Chapter 140, sections 181 and 183A shall conduct business between the hours of 12 midnight and 6:00 a.m.
>
> This By-law shall not apply to the sale of food or alcoholic beverages to be consumed on the premises at which they are sold when such sale is by a licensed common victualler previously engaged in the sale of food to be consumed on the premises.

(National's Ex. 11.)

On January 23, 1989, the Board sent a letter to the Vice-President of Operations of National conveying the Board's concern over problems stemming from the crowds at the late shows and inviting a representative of National to meet with the Board on February 2, 1989 to discuss the matter. A representative of National did meet with the Board on that day. Approximately thirty residents of the Town, some of whom lived in the general vicinity of the theater, were also present at the meeting.

Appendix B

National took the Board's concerns seriously. Immediately after the meeting a representative of National met with the Town's Chief of Police to discuss ways to improve security in and around the theater. Virtually immediately, National set up a plan to increase neighborhood protection on Friday and Saturday nights. In accordance with this plan National privately hired off-duty Dedham Police Officers to patrol the theater and the adjacent community and furnished a vehicle to patrol the Showcase parking lot on Friday and Saturday evenings. Occasionally this vehicle would also patrol the surrounding residential neighborhood as well as the local public transportation stops. This new security plan went into effect on February 10, 1989. In addition to heightened security, National also instituted a program of litter clean-up crews and screen announcements describing alternative auto exits.

Despite National's attempts to address the concerns of the Town, the Town Meeting voted on April 24, 1989, to adopt an amended Article Forty which pushed the closing time back to 12:30 a.m. and expressly exempted late night ballroom dancing from the new By-law. On August 14, 1989, however, the Attorney General of the Commonwealth of Massachusetts declared amended Article Forty unconstitutional on the ground that the proposed By-law, by distinguishing ballroom dancing from other forms of entertainment, and more specifically from other forms of dance, failed the content neutrality test and thus violated the Declaration of Rights of the Constitution of Massachusetts.

Undaunted, the Board proposed a new Article Four on the Town Meeting Warrant for a Special Town Meeting on November 6, 1989. The new Article Four stated:

Article 4: By the Board of Selectmen: To see

if the Town will vote to amend Chapter XIII of the Revised By-laws of the Town of Dedham, entitled "Police Regulations" by adding a new section at the end thereof, as follows: Section *57.*

Unless otherwise restricted, no holder of a license issued by the Town of Dedham, pursuant to Massachusetts General Laws, Chapter 140, sections 177A, 181, and 183A,[1] shall permit any activity licensed thereunder to be conducted between the hours of 1:00 a.m. and 6:00 a.m.

Recommendation: That it be so voted.

(National's Ex. 44.)

The Dedham Town Meeting duly approved this Article. On February 8, 1990, the Attorney General for the Commonwealth approved Article Four albeit noting expressly that he was unable to make a factual determination as to whether the effect of closing certain licensed establishments between 1:00 a.m. and 6:00 a.m. was substantially related to the Town's proper governmental interests or whether the effect was greater than necessary to protect that governmental interest. Upon the approval of the Attorney General, Article Four (hereafter called "the By-law") took effect twenty days later.

National was ready. It filed suit in this court on the same day.

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1. In general, Mass. Gen. L. ch. 140, §§ 177A, 181, and 183A grants cities and towns the authority to grant and revoke licenses for amusement devices, concerts, dances, exhibitions, public shows, and the like.

Appendix B

In its complaint National alleged that Article Four violates National's free speech rights under both the United States Constitution and the Massachusetts Declaration of Rights, violates the due process clause in being unfairly vague and ambiguous, and violates the equal protection clause in that it unreasonably restricts National's hours of operation while permitting other licensed establishments beyond the reach of Mass. Gen. L. ch. 140, §§ 177A, 181, and 183A — for example, hotel lounges and bars and other forms of licensed entertainment such as cable television — to continue operation after 1:00 a.m. National sought injunctive relief and this Court, as is its wont, consolidated the hearing on National's motion for a preliminary injunction with an immediate trial on the merits. Fed. R. Civ. P. 65(a)(2). Faced by the prospect of a full trial, the Board of Selectmen caved in, stipulating that the By-law would not be enforced with respect to ten of the twelve theaters in the Showcase complex pending the outcome of the instant case.[2] National, for its part, withdrew its motion for preliminary injunctive relief, and both parties successfully sought a continuance on the ground that the case was probably on its way to settlement.

The parties could not, however, reach a settlement. For a time, the Court urged adoption of a statement of agreed facts, *see*

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2. The power of the Board of Selectmen simply to stipulate that they would not enforce a duly-enacted town By-Law is unclear. Apparently the Board feared the cost of a major legal confrontation. Viewed from this perspective the Board action is simply a stark example of the situation that today confronts the executive branch of government at the local, state, and national levels. Perennially strapped for cash, with a legislature — here, the Dedham Town Meeting — unwilling to raise taxes, what may be called 'law enforcement triage' necessarily takes place, with the result that only certain laws are enforced and those only to the level of available resources.

Appendix B

Continental Grain Co. v. Puerto Rico Maritime Shipping Auth., 972 F.2d 426, 429 n.7 (1st Cir. 1992) and *Boston Five Cents Savings Bank v. Secretary of Dep't of Housing and Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985), but, despite efforts toward this end, no agreement as to material facts was reached. As the case dragged on, National evidently began to feel that its position needed bolstering in light of the Town's argument that the By-law is a reasonable, content neutral 'time, place, or manner' restriction. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986). In late June and early July, 1993, National secretly engaged a marketing research firm to visually survey the patrons of its evening shows, note their race, and inquire of a representative sampling of late show patrons (without regard to race) why they chose to attend the late show. (National's Ex. 110).[3] This survey — marked confidential and privileged (though it is not) —purports to show that the majority of late show movie viewers are black, and that many late night patrons prefer that time slot. (*Id.*) National now contends, without amending its Complaint, that the survey is evidence that racial animus impended the Town to enact the By-law. Faced with an ever expanding stain of allegations, escalating defense costs, and no end in sight, the Town did what it could easily have done three years ago to cap its transaction costs — it moved for summary

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3. This secret and invidious survey raises extremely troubling questions concerning the judgment of National and its counsel. One wonders at the feelings of patrons of the Dedham Showcase Cinema during the summer of 1993 had they known they were secretly being counted and categorized based on their race. Indeed, what National did here appears the functional equivalent of noting the race of a customer on a check — a violation of Mass. Gen. L. ch. 93, § 105(b)(5) which implicates Mass. Gen. L. ch. 93A, § 2. Accordingly, the Clerk of Court is directed to send a certified copy of this opinion to the Attorney General of Massachusetts for such further investigation pursuant to Mass. Gen. L. ch. 93A, § 4 as he may deem appropriate.

judgment upon the undisputed — albeit now voluminous — record.

ANALYSIS

The outcome of this aspect of the case turns on the level of judicial scrutiny applied to the By-law.

> The Supreme Court has evolved two distinct approaches to the resolution of first amendment claims; the two correspond to the two ways in which government may "abridge" speech. If a government regulation is aimed at the communicative impact of an act, analysis should proceed along what we will call *track one*. On that track, a regulation is **unconstitutional** unless government shows that the message being suppressed poses a "clear and present danger," constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny. If a government regulation is aimed at the noncommunicative impact of an act, its analysis proceeds on what we will call *track two*. On that track, a regulation is **constitutional**, even as applied to expressive conduct, so long as it does not unduly constrict the flow of information and ideas.

Appendix B

. . .

> Government may be deemed to have "abridged" speech in the first sense, thus triggering track-one analysis, if *on its face* a governmental action is targeted at ideas or information that government seeks to suppress, or if a governmental action neutral on its face was *motivated* by (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty. Of course, the target of government action will be instantly recognizable if the government openly admits that its purpose is limiting information or suppressing an idea, but government will ordinarily defend a restriction on free expression by reference to some danger beyond the speech itself — often, by invoking the permissive talisman of "time, place, or manner" regulation.

Laurence H. Tribe, *American Constitutional Law*, 2d ed. (1988) at 791-92, 104 (footnotes omitted, emphasis added).

Regulations focusing on the direct impact of protected speech on its audience are thus **content based.** *Boos v. Barry*, 485 U.S. 312, 321 (1988). Since they target express language and its frank impact on an audience, content based restrictions face a heavy presumption against constitutionality. Consequently, in order for a state to enforce a content based restriction, it must show that the ordinance serves a compelling state interest and that the restriction is narrowly drawn to meet that end. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983).

Content neutral restrictions, on the other hand, are "those that 'are *justified* without reference to the content of the regulated speech.' " *City of Renton,* 475 U.S. at 48 (citations omitted) (emphasis in original). Unlike content based restrictions, content neutral restrictions are aimed at the secondary effects of the language. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293-94 (1984). In other words, the justification undergirding content neutral restrictions "ha[s] nothing to do with . . . speech." *Boos v. Barry,* 485 U.S. at 320. Therefore, in order to sustain a regulation that is content neutral the government need only establish that the restriction is a reasonable restraint on the time, place, and manner of such speech and that the law does not unreasonably limit alternative avenues of communication. *City of Renton,* 475 U.S. at 47, citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984).

By its terms the By-law in the present case prohibits, between 1:00 a.m. and 6:00 a.m., ***all*** activity licensed under Mass. Gen. L. ch. 140, §§ 177A, 181, and 183A.[4] "Any inference that government's aim is keeping people ignorant of ideas or information that it considers dangerous must normally be made in the first instance from the face of the statute." L. Tribe, *supra* at 794-95. Here, after a close reading of the By-law, this Court draws no inference that on its face the By-law aims at either the content of the movies or their influence on their viewers. Indeed, National concedes as much. National does not attempt to argue that the By-law is content based. To the contrary, at ¶ 26 of Count One of the Complaint alleging violations of the First Amendment and Article Sixteen of the Massachusetts Declaration of Rights, National complains that the By-law represents a "purported effort to solve certain alleged problems where such problems are shown

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4. *See supra* at 5, n. 1.

to be unrelated to the speech activity itself." Thus National concedes that justification of the By-law stems from the Town's desire to curb the secondary effects of late shows. Therefore, it is undisputed, and this Court rules, that as a matter of law the By-law is content neutral.

Analysis does not end at this point. Even though the By-law is content neutral, it does restrict somewhat a vitally important outlet for speech and thus the Court must examine whether the By-law is legitimately aimed at the secondary effects of late night entertainment and, if so, whether those secondary effects are of significant governmental interest and allow reasonable alternatives for the same communication. *Young v. American Mini Theatres,* 427 U.S. 50, 63 n.18 (1975) (a reasonable time, place, and manner restriction must advance a significant governmental interest); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984) (a reasonable time, place, and manner restriction must allow reasonable alternatives for that same communication).

The Minutes of the Board Meetings and the transcripts of Town Meetings during the discussions concerning National reveal that the Town was ostensibly concerned about late night traffic as well as actual and potential security problems at the Showcase and surrounding neighborhood. (*See generally,* Town's Exs. 4-33; National's Ex. 28, 29, 40, 42, 43, 100, 101). According to the deposition testimony of Board members, the By-law was adopted in part to quell traffic problems and in part to ensure that there was a period of time during the late evening hours, when Town citizens were generally sleeping, that was devoid of retail sales and other commercial activity. (Kehoe Dep. at 39-40, 71, 74-79; Taurasi Dep. at 34, 35, 37-39, 42, 52-54; Boylen Dep. at 27; *see also* Greenwood Dep. at 53, 54, 59.)

National does not directly impugn this evidence but it does argue that the proffered "significant government interest" is, in fact, a sham and that the passage of Article Forty and the subsequent Article Four are racially motivated and seek to target blacks and restrict their entertainment options.[5] National suggests that references such as "undesirable element that's attracted by General Cinema activity" (Transcript of April 24, 1989 Town Meeting — National's Ex. 34 at 60-61), "people problems" (Transcript of April 10, 1989 Town Meeting — National's Ex. 33 at 92), and "nice little out-of-towners" (Transcript of April 24, 1989 Town Meeting — National's Ex. 34 at 60) carry racial overtones and are but code words to mask racial animus. It clinches its argument with reference to its secret survey.

While the Court, for purposes of this motion, will accept the arithmatic accuracy of the survey and the conclusory assertions that it conforms to accepted marketing survey practice, it is simply not probative, as a matter of logic, of most of the essential points for which National advances it.

It is undisputed that the survey was conducted only for a few weeks during the summer of 1993. Even so, the Court puts aside the considerations that movies are marketed primarily to the young, that school was out, that homework was over, and that people were moving into a summer jobs and vacation schedule since the affidavit of Anthony D. Pungitore, manager of the Showcase since 1986, avers that late show patrons are, and have been at all material times, "predominantly" black, while moviegoers earlier in the evening are "predominantly" white.

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5. Although National is not a member of a protected class, this Court rules that it has standing to assert the rights of its patrons. *See Secretary of State of Maryland v. Joseph H. Munson Co. Inc.*, 467 U.S. 947, 955-58 (1984).

The Court therefore accepts the racial mix of Showcase audiences as proffered by National.

But what of it? On the present record, there is not the slightest evidence that anyone ever gave this a thought until National began totaling up its customers and separating them by race. The summary judgment record is devoid of evidence that race played a role in the decision to adopt the By-law. Selectman Hoell testified that he has no knowledge of the race or color of patrons of the late shows and that, prior to his deposition, he had never discussed the race or color of theater patrons with neighbors of the Showcase. (Hoell's Dep., Town's Ex. 25 at 81-82.) Selectwoman Kehoe also testified that she had no knowledge, at the time of the enactment of the By-law, as to the race of the patrons of the late shows. (Kehoe Dep., Town's Ex. 15 at 89.) Also according to Kehoe and Selectman Taurasi the Town has never conducted demographic studies relative to the late shows. *(Id.;* Taurasi Dep., Town's Ex. 16 at 57.) While a court must be hesitant to grant summary judgment where matters of mental intent are at issue, *Hahn v. Sargent,* 523 F.2d 461, 468 (1st Cir. 1975), *cert. denied,* 425 U.S. 904 (1976), since *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986), National must come up with **some** evidence that would carry the burden of production on the issue of racial animus. *Villanueva v. Wellesley College,* 930 F.2d 124, 127-28 (1st Cir.) *cert. denied,* 112 S. Ct. 181 (1991). It has had three years to do so. It has failed.

To the contrary, upon the present record "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *City of Renton,* 475 U.S. at 50, quoting *Young v. American Mini Theatres,* 427 U.S. 50, 71. In order for the Town to show that it was attempting to preserve the quality of urban life, it need only establish that evidence relied upon in enacting the By-law was "reasonably believed to be relevant to

the problem that the [Town] address[d]." *City of Renton,* 475 U.S. at 51-52. The evidence in the present case discloses that the Town relied upon the complaints of neighborhood and nighttime disturbances voiced by the residential abutters of the Showcase complex. It is undisputed that the Town's residents expressed general displeasure with the theater complex. National concedes that between February 2, 1989 and April 6, 1989 representatives of National "met with Town of Dedham residents on five separate occasions. During the course of these meetings, National proposed and developed plans to alleviate any articulated concerns pertaining to traffic, noise and security at or around the Showcase Cinemas complex." (Complaint ¶ 10). While the Court recognizes that National undertook to assuage the concerns of the Town residents, the Town's choice of a different method to combat those problems does not call into question either the Town's articulated concerns or relevance of the By-law to those concerns. *City of Renton,* 475 U.S. at 52.

This Court finds, therefore, that the By-law is genuinely aimed at the secondary effects of late night movies[6] and rules that dealing with these articulated secondary effects constitutes a valid governmental interest.

Balked of victory in challenging the 'significant governmental interest' portion of the test, National turns to challenge the assertion that the By-law allows reasonable alternatives for the same communication. National concedes, of course, as it must, that the Showcase runs the same movies at both

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6. This determination is what my friend and colleague Judge Keeton refers to as finding a "premise fact." Robert E. Keeton, Legislative Facts and Similar Things: Deciding Disputed Premise Facts, 73 Minn. L. Rev. 1, 8 (1988). This is to be distinguished from the finding made *infra* under Fed. R. Evid. 104(a). Keeton, *supra* at 8 n. 19, and 68 n. 185.

the early and late night showings, the earlier showings being entirely unaffected by the By-law. To the logical observation that the afternoon and evening showing afford a reasonable venue for the same communication, however, National again has recourse to the secret survey, this time with a bit more success.

Taking the survey and the Pungitore affidavit together, and drawing all inferences in favor of National, it appears that more blacks than whites consistently attend the late shows. It follows, therefore, that prohibiting the late show will affect more blacks than whites.

National then seeks to bootstrap its so-called 'disparate impact' analysis into a requirement that the By-law be subjected to strict scrutiny. The attempt will not wash.

National asserts that the Supreme Court's recent decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 113 S. Ct. 2217 (1993) ("*Babalu*"), requires this Court to go back and examine both direct and circumstantial evidence to determine if the object of the law was to restrict blacks from attending the late night shows. In *Babalu,* the Supreme Court warned that a "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens" on selected groups. *Id.* at 2232. *Babalu,* however, dealt with an ordinance explicitly prohibiting ritualistic animal sacrifices. The Supreme Court ruled that the use of the word "ritual" and "sacrifice" necessarily implicated religious practices and therefore the ordinance targeted the Santeria religion and, in the parlance of the present analysis, was not content neutral. *Id.* at 2228. *See* Stephen L. Carter, The Resurrection of Religious Freedom?, 107 Harv. L. Rev. 118, 125 (1993). Here, in contrast, this Court has ruled that the By-law is genuinely content neutral and a valid exercise of a Town's police powers. The *Babalu* decision is not controlling.

Appendix B

The fact that the By-law may incidentally affect one protected class more than the general public does not necessarily subject that ordinance to strict scrutiny. Though otherwise inapposite, *Babalu* does provide some guidance on this point, since the general applicability requirements that undergird the Freedom of Religion Clause parallel First Amendment jurisprudence. *Babulu,* 113 S. Ct. at 2232 (citations omitted). Indeed, freedom of religion cases have often addressed the issue of ordinances that seemingly have a greater adverse affect on particular religions than on the general populace. "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Babalu,* 113 S. Ct. at 2226, citing *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). Such is the situation here.

Even so, the serious nature of the allegation of "disparate impact" has caused the Court to scrutinize the record with care in light of the teachings of *Babalu.* Such scrutiny reveals that the entire claim of "disparate impact" rests on a logical fallacy. The question presented in this step of the analysis is whether there are reasonable alternatives for the same communication — here specifically whether the afternoon and evening showings of the same movies in the same theater constitute such a reasonable alternative. The secret survey and the Pungitore affidavit establish that more blacks than whites attend the late shows. The question, then, is this — what happens to the movie communication with these people if the By-law bans the late shows? It is here National claims the disparate impact.

The claim is nonsense. To prove that canceling the late shows would extinguish a significant amount of protected

communication, the survey inquired of every third theater patron — during the short period it was conducted — their reasons for attending. This written survey was conducted regardless of the race of the patron. It is, therefore, simply not possible to infer — the secret survey itself does not even make this claim, it is found in the affidavit of Lara Jordan James — that the effects of closing down the late night shows are any different for blacks as a group than for whites. That is, for all that appears, the effect of closing down the late night shows is identical for each patron and his or her alternative entertainment options are identical regardless of race. There simply is no disparate effect along racial lines and this is the concern where the issue is the adequacy of alternative times for the same communication.[7]

National is thus left with the claim that closing down its late night shows will deprive certain of its patrons of the opportunity to visit the Showcase (and National of the opportunity to screen films for them for a fee). This claim makes some sense. National does not run its late shows as a public service. Its aim is to make money. If everyone who attends the late shows would come to the matinee or evening shows, surely the economies of scale and the resultant personnel savings would themselves force National to

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7. It is important to understand what the Court is doing here. The James' affidavit expressly concludes, "[C]ancelling this show would have a disproportionate impact on [black] members of the theater-going public. . . . [T]he late show is the only opportunity that the Theater has . . . to communicate with a distinct portion of its patrons." (National's Ex. 110.) This is purported expert opinion. The Court, however, rejects these conclusions as logically indefensible in exercise of its duty to make preliminary findings under Fed. R. Evid. 104(a) before receiving so-called expert opinions. *See LeBlanc v. Great American Inc. Co.*, 6 F.3d 836, 848 (1st Cir. 1993) (affirming district court decision upon summary judgment record to exclude statistical opinion due to inadequate sample size).

cease late shows wholly without the By-law.[8] The Court thus credits National's claim that the By-law will operate to deprive it of a portion of its audience.

The question, however, is whether the By-law allows for **reasonable** alternatives for the same communication. National, again pointing to its secret survey, says not. While the Court must give every inference to National in adjudicating this summary judgment motion, it cannot help but approach the survey with some skepticism since no raw data have been provided and the individual responses are aggregated and appear to be summarized in a fashion slanted to favor National's contentions. Still, to give the survey its due, it appears that during the short time it was conducted that 14% of the late night patrons reported they had to work late and could only come to "a late show" while an additional 11% may[9] have considered this their only entertainment option. Thus, giving National every reasonable inference, a full quarter of its late show patrons (or roughly 75-125 people each evening, given the survey ticket tallies) will miss the movies they otherwise would have seen at the Showcase if the By-law is enforced. The Court rules, nevertheless, that given the content neutral nature of the By-law and the legitimate governmental interests that support it, the By-law does afford reasonable alternative means of expressing the same communication.

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8. This conclusion assumes no competitor in the relevant market is exhibiting movies during the late night time slot. The summary judgment record here makes no mention of any such competition.

9. The word "may" is appropriate here since the survey is internally inconsistent on the point, reporting elsewhere that but 5% of late show patrons had no other entertainment option. The latter figure is the more persuasive. It corresponds generally with those who say they would spend time with friends (5%), play board or video games at home (4%), or make love (3%) were there no late show to attend.

National argues, even so, that less restrictive, narrowly tailored means could remedy the same problems as sought to be curbed by the By-law. "The term 'narrowly tailored' so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986). A content neutral analysis, however, does not require the Court to find that the restriction is a narrowly tailored means to an end. The Supreme Court has held the "[l]ess-restrictive-alternative analysis . . . has never been part of the inquiry into the validity of a [content-neutral] time, place, and manner regulation. It is enough that the . . . restriction substantially serves the Government's legitimate ends." *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984) (footnote omitted). Consequently this Court need not and will not engage in a less restrictive alternative analysis. The holding that the By-law affords reasonable alternative means for the same communication will stand.

As its last ditch stand, National argues that the By-law is violative of due process in that it is unconstitutionally vague and targets the Showcase, thus demanding a higher level of scrutiny.

In the First Amendment area especially, the Supreme Court requires "precision of drafting and clarity of purpose." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975). An ordinance which is imprecise and ambiguous as to substantial provisions is void for vagueness. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). National pins its vagueness claim on the fact that the By-law fails to define precisely what constitutes licensed activity. Here, the By-law prohibits the conduct of any

activity licensed under Mass. Gen. L. ch. 140, §§ 177, 181, and 183A between the hours of 1:00 a.m. and 6:00 a.m. Activities licensed under Mass. Gen. L. ch. 140, § 181 include "theatrical exhibitions, public shows, public amusements and exhibitions of every description." The By-law provides sufficient guidance as to what activities are specifically proscribed. This includes public movie showings. *See City of Fitchburg v. 707 Main Corp.*, 369 Mass. 748, 751 (1976).

Last, National asserts that since the Showcase is the only licensed entertainment complex conducting its license after 1:00 a.m. and since it is named on the petition which ultimately led to the proposed Article Forty, Showcase is the victim of targeting. In support of this contention, National cites *Leathers v. Meadlock*, 499 U.S. 439, 447 (1991) (a state sales tax on cable services, which exempted print media, did not violate the First Amendment) which held that an ordinance "will trigger heightened scrutiny if it discriminates on the basis of the content of . . . speech." This case is wholly inapplicable to the present situation since the By-law is not content based.[10] In fact, National is not the only commercial business whose profits are curtailed by Town By-laws which prohibit late night business activity.[11]

---

10. National also looks to *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1982). *Minneapolis Star*, however, also involved an ordinance that was not content neutral.

11. The town has a progression of ordinances designed to insure that commercial activities do not impinge on private, residential life. Section 42 of the Town's Revised By-law, as amended in 1976, prohibits individuals from the retail sale of food between the hours of 12:00 midnight and 6:00 a.m. In 1978, the Town rolled back the closing time for licensed establishments which sell alcoholic beverages from 2:00 a.m. to 1:00 a.m. Section 42A, added to the By-laws in 1976

(Cont'd)

Appendix B

CONCLUSION

The Court declares that the By-law at issue here is content neutral, serves a legitimate governmental interest, and offers reasonable alternative avenues for the same communication. It is, therefore, a reasonable time, place, and manner restriction on First Amendment rights which does not violate the Equal Protection clause, as its incidental effect upon a protected class is no different than on society generally. Moreover, the Court rules that National has received such process as is its due from the Town and from this Court.[12]

For these reasons, the Town's motion for summary judgment is GRANTED.

s/ William G. Young
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

(Cont'd)
and amended in 1979, prohibits retail establishments from the sale of any retail commodity (except fuel products) between 12:00 midnight and 6:00 a.m. Finally, in 1980 the Town voted to prohibit the illumination of signs for retail establishments which were proscribed from operation under section 42A.

12. While the Court recognizes that in some respects the protections of the Declaration of Rights of the Constitution of Massachusetts sweep more broadly than the cognate provisions of the Bill of Rights, *see e.g., Commonwealth v. Sees*, 374 Mass. 532, 536-38 (1978) (nude dancing protected as expressive); *see generally* Herbert P. Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 14 Suffolk U. L. Rev. 887 (1980), no broader protection for the late shows is here claimed to arise out of the Constitution of Massachusetts. The point being waived, the Court assumes, without deciding, that the freedom of speech protections found in the two constitutions are coextensive.

APPENDIX C — TOWN OF DEDHAM AMENDED BY-LAW

MARGARET M. McGOWAN
TOWN CLERK

TOWN OF DEDHAM
COMMONWEALTH OF MASSACHUSETTS

TEL 326-1638

SPECIAL TOWN MEETING, NOVEMBER 6, 1989

ARTICLE 4: By the Board of Selectmen:

To see if the Town will vote to amend Chapter XIII of the Revised By-Laws of the Town of Dedham, entitled, "Police Regulations" by adding a new section at the end thereof, as follows:

> Section 57.
>
> Unless otherwise restricted, no holder of a license issued by the Town of Dedham, pursuant to Massachusetts General Laws, Chapter 140, Sections 177A, 181 and 183A, shall permit any activity licensed thereunder to be conducted between the hours of 1:00 A.M. and 6:00 A.M.

It was so VOTED. UNANIMOUS VOTE

A true copy attest:

s/ Margaret M. McGowan
Margaret M. McGowan
Town Clerk

APPENDIX D —RELEVANT STATUTES

Mass. Gen. L. ch. 140, § 177A:

AUTOMATIC AMUSEMENT DEVICES

Caption added by St.1949, c. 361

§ 177A. Amusement devices; license; definition; fee; view and inspection; gambling; nonapplicabilty of lottery statute

(1) The licensing authorities of any city or town may grant, and after written notice to the licensee, suspend or revoke a license to keep and operate an automatic amusement device for hire, gain or reward, approved by the director of standards and necessaries of life under section two hundred and eighty-three of chapter ninety-four.

(2) The term "automatic amusement device" as used in this section shall be construed as meaning any mechanism whereby, upon the deposit therein of a coin or token, any apparatus is released or set in motion or put in a position where it may be set in motion for the purpose of playing any game involving, in whole or in part, the skill of the player, including, but not exclusively, such devices as are commonly known as pinball machines including free play pinball machines.

(3) Licenses granted under this section, unless sooner revoked, shall expire on December thirty-first of each year. Every such license shall specify the street and number of the premises where the automatic amusement device is to be kept or offered for operation or give some particular description of such premises, shall state the type of the automatic amusement device to which it relates, and shall cover any automatic amusement device of the same type which as a substitute or replacement for the automatic

amusement device licensed, may, during the term of the license, be kept or offered for operation on the premises specified; but such license shall under no circumstances cover an automatic amusement device of a type other than the type stated in such license; and such license shall not cover the automatic amusement device if in any place other than the premises from time to time specified in such license. No such license shall specify more than one premises at one time. Upon written application, the licensing authority may from time to time amend any license granted under this section by changing the premises specified.

(4) The annual fee for a license under this section for any automatic amusement device licensed hereunder, or any renewal thereof, shall be twenty dollars, unless otherwise established in a town by town meeting action and in a city by city council action, and in a town with no town meeting by town council action, by adoption of appropriate by-laws and ordinances to set such fees, but in no event shall any such fee be greater than one hundred dollars. The fee for every change of premises shall be two dollars.

(5) Automatic amusement devices licensed under this section shall be so installed on the premises described in the license as to be in open view at all times while in operation, and shall at all times be available for inspection.

(6) No person keeping or offering for operation or allowing to be kept or offered for operation any automatic amusement device licensed under this section shall permit the same to be used for the purpose of gambling.

(7) The provisions of section seven of chapter two hundred and seventy-one of the General Laws shall not apply to machines licensed under the provisions of this section.

(8) Any violation of any provision of this section or of chapter one hundred and thirty-six of the General Laws by any person managing or controlling any premises where an automatic amusement device licensed under this section is kept or offered for operation shall be cause for the revocation of all licenses for automatic amusement devices kept or offered for operation on such premises.

Added by St.1949, c. 361. Amended by St.1981, c. 351, § 83; St.1981, c. 520

Mass. Gen. L. ch. 140, § 181:

THEATRICAL EXHIBITIONS, PUBLIC AMUSEMENT, ETC.

§ 181 Licenses; fees; application; suspension or revocation; workmen's compensation coverage

The mayor or selectmen may, except as provided in section one hundred and five of chapter one hundred and forty-nine, grant and set the fee for, upon such terms and conditions as are described hereinafter, a license for theatrical exhibitions, public shows, public amusements and exhibitions of every description, to be held upon weekdays only, to which admission is obtained upon payment of money or upon the delivery of any valuable thing, or in which, after free admission, amusement is furnished upon a deposit of; money in a coin controlled apparatus, but in no event shall any such fee be greater than one hundred dollars.

The application for such a license shall be in writing and shall fully and specifically describe the conditions of the proposed exhibition, show, or amusement and the premises upon which the proposed exhibition, show, or amusement is to take

place, to the extent that such conditions or premises would affect the public safety, health or order. Upon written request of the mayor or selectmen, the applicant shall in addition furnish reasonable information concerning the conditions of the premises and actions to be taken in order to prevent danger to the public safety, health, or order. Within thirty days following receipt of such application, the mayor or selectmen shall grant a license or shall order a hearing preceded by at least ten days written notice to the applicant. Within forty-five days next following the close of such hearing, the mayor or selectmen shall grant such license or shall deny such license upon a finding that issuance of such a license would lead to the creation of a nuisance or would endanger the public health, safety or order by:

(a) unreasonably increasing pedestrian traffic in the area in which the premises are located or

(b) increasing the incidence of disruptive conduct in the area in which the premises are located or

(c) unreasonably increasing the level of noise in the area in which the premises are located.

Notice of such a denial shall be delivered to the applicant in writing and shall be accompanied by a statement of the reasons therefor. No application shall be denied if the anticipated harm is not significant or if the likelihood of its occurrence is remote. The mayor or selectmen may impose conditions upon a license but said conditions may only relate to compliance with applicable laws or ordinances, or to public safety, health or order, or to steps required to be taken to guard against creation of a nuisance or to insure adequate safety and security for patrons or the affected public.

Appendix D

No applicant having been denied a license as aforesaid shall submit the same or a similar application within one year of said denial without including in said new application facts showing that the circumstances upon which the original denial was based have substantially changed.

The mayor or selectman may revoke or suspend a license granted pursuant to the provisions of this section upon finding, after a hearing preceded by ten days written notice to the licensee, that conditions exist which would have justified denial of the original application for such license provided, that the mayor or selectmen may petition the superior court department of the trial court to enjoin any violation of this section.

No license shall issue, however, for a traveling carnival, circus or other such traveling amusement which does not have its principal place of business within the commonwealth unless the licensee certifies that he has provided by insurance for the payment of compensation and the furnishing of other benefits under chapter one hundred and fifty-two to all persons to be employed by said licensee and that such insurance shall continue in full force and effect during the term of the license; and the licensee further certifies that he has obtained a policy of public liability insurance in the amount of at least twenty-five thousand dollars to pay any claims or judgments rendered against the licensee in favor of patrons or others to recover damages resulting from the negligence of the licensee. The amount of insurance of the policy hereinbefore required or in effect shall not limit or impair any right of recovery to which any plaintiff may be entitled in excess of such amount.

Amended by St. 1971, c. 996; St.1979, c. 358, § 3; St.1981, c. 351, § 84.

Appendix D

Mass. Gen. L. ch. 140, § 183A:

§ 183A. Concerts, dances, exhibitions, public shows, etc.; license; application; suspension or revocation; rules and regulations

No innholder, common victualler, keeper of a tavern, or person owning, managing, or controlling any club, restaurant or other establishment required to be licensed under section twelve of chapter one hundred and thirty-eight or under section two, twenty-one A or twenty-one E of chapter one hundred and forty, and no person owning, managing, or controlling any concert, dance, exhibition, cabaret or public show of any description to be conducted on any premises required to be licensed under the sections described above, shall, as a part of its usual business, offer to view, set up, set on foot, maintain or carry on a concert, dance exhibition, cabaret or public show of any description, unless and until a license therefor has been issued by the licensing authorities.

The application for such license shall be in writing and shall state the type of concert, dance, exhibition, cabaret or public show sought to be licensed and shall state whether such public show will include: (a) dancing by patrons, (b) dancing by entertainers or performers, (c) recorded or live music, (d) the use of an amplification system, (e) a theatrical exhibition, play, or moving picture show, (f) a floor show of any description, (g) a light show of any description, or (h) any other dynamic audio or visual show, whether live or recorded.

The application shall also state whether as part of the concert, dance exhibition, cabaret or public show any person will be permitted to appear on the premises in any manner or attire as to expose to public view any portion of the pubic area, anus, or

genitals, or any simulation thereof, or whether any female person will be permitted to appear on the premises in any manner or attire as to expose to public view any portion of the breast below the top of the areola, or any simulation thereof.

Upon request of the licensing authorities, the applicant shall furnish further additional information concerning the type of concert, dance exhibition, cabaret, or public show sought to be licensed, the conditions of the premises, and the actions to be taken in order to prevent danger to the public safety, health or order. Once a license has been granted to an applicant, the licensee shall continue to provide such information to the licensing authorities upon their request with regard to any particular concert, dance, exhibition, cabaret, or public show or with regard to the conduct of the premises in general.

Within forty-five days following receipt of an application for a license under this section, the licensing authorities may (a) grant a license or, (b) shall provide the opportunity for a hearing on the application by written notice to the applicant given seven days prior to the hearing date.

Within thirty days next following the final date of such opportunity for a hearing the licensing authorities shall, (a) grant the license or, (b) deliver to the applicant a written notice denying the license and stating in writing the reasons for such denial. No application having been denied as aforesaid and no similar application thereto may be filed within one year of said denial except in the discretion of the licensing authorities.

The licensing authorities shall grant a license under this section unless they find that the license, taken alone or in combination with other licensed activities on the premises, would adversely affect the public health, safety or order, in that the

concert, dance, exhibition, cabaret, or public show cannot be conducted in a manner so as to: (a) protect employees, patrons, and members of the public inside or outside the premises from disruptive conduct, from criminal activity, or from health, safety or fire hazards; (b) prevent an unreasonable increase in the level of noise in the area caused by the licensed activity or caused by patrons entering or leaving the premises; or (c) prevent an unreasonable increase in the level of pedestrian or vehicular traffic in the area of the premises or an unreasonable increase in the number of vehicles to be parked in the area of the premises.

The licensing authorities may modify, suspend or revoke a license granted pursuant to the provisions of this section after providing an opportunity for a hearing preceded by a written notice to the licensee ten days prior to the hearing date. The licensing authorities may not motify, suspend or revoke such license unless they find that the license, taken alone or in combination with other licensed activities on the premises, has adversely affected the public health, safety or order as stated in the preceding paragraph. In any case in which the licensing authorities modify, suspend or revoke a license, they shall notify the licensee in writing of such action and said written notice shall be accompanied by a statement of reasons.

In order to preserve and protect the public health, safety, and order as aforesaid, the licensing authorities may place conditions upon the license and promulgate rules and regulations for such licenses. The licensing authorities may modify, suspend or revoke a license pursuant to this section for any violation of their rules and regulations or for any violation of law and may petition the superior court department of the trial court to enjoin any violation of this section.

Appendix D

The licensing authorities of any city or town may adopt a rule requiring licensees under this section to prohibit minors from attending any concert, dance, exhibition, cabaret or public show of any description in which or at which any person appears in a manner or attire as to expose to public view any portion of the pubic area, anus, or genitals, or any simulation thereof, or in which or at which any female person appears in a manner or attire as to expose to public view any portion of the breast below the top of the areola, or any simulation thereof.

A license issued under this section, unless sooner revoked, shall expire on December thirty-first of each year. The fee for any such license or for any renewal thereof shall not exceed one hundred dollars.

The provisions of this section shall be applicable seven days per week; provided, however, that no license under this section shall be granted to permit such activities, except an athletic game or sport, or motion picture exhibited at a drive-in theatre during the period from the last Sunday in April to the last Sunday in October, on Sundays or before one o'clock in the afternoon on Sundays, without the written approval of the commissioner of public safety, made in accordance with the provisions of this section, upon written application to the said commissioner accompanied by a fee of not more than five dollars, or in the case of an annual license by a fee of not more than one hundred dollars.

Amended by St.1935, c. 102, § 1; St.1936, c. 71, § 1; St.1981, c. 351, § 85; St.1981, c. 694, § 1.

APPENDIX E — RELEVANT UNITED STATES CONSTITUTIONAL AMENDMENTS

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

(The first 10 Amendments were ratified December 15, 1791, and form what is known as the "Bill of Rights")

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

(Ratified July 9, 1868)

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among

the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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* Changed by section I of the twenty-sixth amendment.

Appendix E

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Supreme Court, U.S.
FILED
MAY 5 1995
OFFICE OF THE CLERK

No. 94-1630

In The

Supreme Court of the United States

October Term, 1994

NATIONAL AMUSEMENTS, INC.,

Petitioner,

vs.

TOWN OF DEDHAM,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Circuit Court of Appeals correctly sustained the District Court's application of the standard of review for summary judgment in ruling that the petitioner failed to establish the existence of a dispute as to any material issue of fact.

2. Whether the First Circuit Court of Appeals correctly sustained the By-Law in question as a content neutral time, place or manner regulation, narrowly drawn to serve significant government interests, which leaves open ample avenues of communication.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Statutory Provisions Involved 1

Statement of the Case 1

A. Procedural History 1

B. The Record Below 5

Reasons for Denying the Writ 11

I. There are no genuine issues of material fact as to a substantial governmental interest or otherwise. . . 11

II. There is no conflict between the decision below and the decisions of this Court, the Ninth or the Eleventh Circuits. 19

Conclusion 23

TABLE OF CITATIONS

Cases Cited:

Acorn Investments, Inc. v. Seattle, 887 F.2d 219 (9th Cir. 1989) 21, 22

Contents

Page

Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981) 13, 20

Baseardones v. Galviston, 682 F.2d 1203 (5th Cir. 1982) . 13

Carey v. Brown, 447 U.S. 455 (1980) 11, 24

Celetex Corp. v. Catrett, 477 U.S. 317 (1986) 18

Church of Lukimi Babalu Ave. Inc. v. City of Hialeah, __ U.S. __, 113 S. Ct. 2217 (1993) 16

City of Boston v. Back Bay Cultural Association, 418 Mass. 175 (1994) 15

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 13, 21

Coalition v. City of Kenosha, 767 F.2d 1248 (7th Cir. 1985) 15

Edenfield v. Fane, __ U.S. __, 113 S. Ct. 1792 (1993) 13, 19, 20, 21

Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) 15

Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) 20

Jefferson v. Hackney, 406 U.S. 535 (1972) 17

Contents

Page

Krueger v. Pensacola, 759 F.2d 851 (11th Cir. 1985) 21, 22

Kuzinich v. Sonta Clara, 689 F.2d 1345 (9th Cir. 1982) ... 13

Leverett v. Pinellas Park, 775 F.2d 1536 (11th Cir. 1985) . 13

Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 20

McCleskey v. Kemp, 481 U.S. 279 (1987) 16

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 16

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 11, 12, 13, 20, 21, 23

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) ... 13

754 Orange Ave., Inc. v. City of West Haven, 761 F.2d 105 (2nd Cir. 1985) 20

Turner Broadcasting System, Inc. v. FCC, __ U.S. __, 114 S. Ct. 2445 (1994) 13, 18, 19, 20, 21, 23

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 18

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 11, 12, 13, 14, 19, 20, 21, 23

Contents

Page

Washington v. Davis, 426 U.S. 229 (1976) 16

Young v. American Mini Theatres, 427 U.S. 50 (1976) ..11, 15, 20

Statute Cited:

M.G.L. c. 140, § 181 2

United States Constitution Cited:

First Amendment 3, 12

Fourteenth Amendment 3

Rule Cited:

Fed. R. Evid. 104(a) 18

Other Authorities Cited:

Massachusetts Declaration of Rights, Article Sixteen ... 3

Town of Dedham By-Laws, Chapter XIII, Section 42 1

Town of Dedham By-Laws, Chapter XIII, Section 42A .. 1

Town of Dedham By-Laws, Chapter XIII, Section 57 1

Town of Dedham By-Laws, Chapter XXVII 1

Contents

Page

APPENDIX

Appendix A — Excerpt from the Record: Town Meetings Minutes, April 10, April 24, and November 6, 1989 ... 1a

Appendix B — Excerpt from the Record: February 5, 1993 Letter of Petitioner's Counsel 43a

Appendix C — Excerpt from the Record: By-Laws Restricting Late Night Commercial Activity 45a

STATUTORY PROVISIONS INVOLVED

In addition to constitutional provisions, statutes and municipal by-laws referenced by the petitioner, the following by-laws have been included in the Appendix hereto:

Section 42 of the Town's Revised By-Laws, Chapter XIII (Police Regulations), as amended in 1976, prohibits the retail sale of any food between the hours of 12:00 midnight and 6:00 A.M. (App., *infra*, 45a-46a).

Section 42A of the Town's Revised By-Laws, Chapter XIII (Police Regulations), as amended in 1979, prohibits retail establishments from the sale of any retail commodity (except fuel products) between the hours of 12:00 midnight and 6:00 A.M. (App., *infra*, 48a).

Chapter XXVII of the Town's Revised By-Laws, as amended in 1980, prohibits the illumination of signs for retail establishments beyond the normal business hours of the establishment to which it pertains, including retail establishments proscribed from operation under Sections 42 and 42A, *supra*. (App., *infra*, 50a-60a).

STATEMENT OF THE CASE

A. Procedural History

National Amusements, Inc. ("National") filed the Complaint giving rise to this action in order to prevent enforcement of and to invalidate a By-Law voted by the Town of Dedham ("the Town") at its Town Meeting on November 6, 1989 and subsequently approved by the Attorney General on February 8, 1990. The By-Law here in issue, Chapter XIII, § 57, provides that:

> Unless otherwise restricted, no holder of a license issued by the Town of Dedham pursuant to Massachusetts General Laws, Chapter 140, Sections 177A, 181 and 183A, shall permit any activity licensed thereunder to be conducted between the hours of 1:00 A.M. and 6:00 A.M.

(R. A46-48, ¶¶ 20, 21, 22, 23; A356, ¶ 27: A289-290). The licensing statutes cited authorize municipalities, in general, to grant and revoke licenses for automatic amusement devices, concerts, dances, exhibitions and public shows for which an admission fee is charged. (Petitioner's App. at 61a-69a).

In 1978, prior to the Town's adoption of the By-Law, National had commenced the regular exhibition of late evening movies ("late movies") on Friday and Saturday nights at the Showcase Cinemas, a cinema complex consisting of twelve theaters, owned and operated by National and located on Route 1 and Elm Street in the Town of Dedham. (R. A41 ¶ 1; A246). Dedham is a "bedroom" suburb of Boston, dissected by one commercial strip of highway, Route 1. Just west of Showcase Cinemas, Route 1 intersects Route 128, a major north-south suburban belt-way of Boston. (R. A539-40). Elm Street serves the entrance to the Cinema and also marks the line between National's complex and the residential neighborhood abutting the complex. (R. A1702). Residences are located on Elm Street. *Id.* The late movies usually started between 11:30 P.M. and 12:30 A.M., and ended between 1:00 A.M. and 2:30 A.M. (R. A42 ¶ 3; A347). Because National exhibits movies under a license issued by the Town pursuant to M.G.L. c. 140, § 181, National is subject to the Town's By-Law, and is prohibited by the By-Law from showing late night movies between the hours of 1:00 A.M. and 6:00 A.M. (R. A48 ¶ 24; A753-54; A755-73).

National's Verified Complaint ("Complaint") in this action, filed on or about February 28, 1990,[1] sought declaratory and injunctive relief, (R. A7, A15, A16), arising out of the Town's adoption of the By-Law, and set forth the following claims: (1) that the By-Law violated National's rights to free speech under the First Amendment to the United States Constitution and Article Sixteen of the Massachusetts Declaration of Rights[2] (Count I); (2) that the By-Law violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution (Count II), because it is "unfairly vague and ambiguous as to exactly what licensed activities are to cease by 1:00 A.M." (A13 ¶ 31); and (3) that the By-Law violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, (Count III), by restricting National's hours of operation, while permitting "other licensed *establishments,* including hotels and bars to remain open after 1:00 A.M.," (emphasis added) (A14 ¶ 35), and permitting "other licensed forms of *entertainment,* including cable television, to continue after 1:00 A.M." (A14 ¶ 36).[3]

On or about February 5, 1983, three years after filing its Complaint and after completion of informal discovery between the parties, National, by way of a third draft of proposed

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1. The By-Law became effective on or about February 28, 1990, but, in lieu of argument on a motion for preliminary injunction, the parties stipulated that the By-Law would not be enforced against National with respect to ten of its twelve theaters during the pendency of this litigation in the district court. (R. A48 ¶ 23, A357-58). National in turn, agreed not to show late movies in the remaining two of its twelve theaters during that period. *Id.*

2. National's claim under Article 16 was deemed waived by the district and appeals courts (Petitioner's App. 37a and 59a) and National has not pursued the claim in its petition.

3. National has not pursued these arguments in its petition.

stipulations of facts, for the first time sought to interject a claim that racial animus motivated the Town in adopting the By-Law.[4]

National's unpled and belated claim of a racial motive was no more than a thinly veiled attempt to raise the level of scrutiny applied to its claims to a strict scrutiny standard. That attempt failed because, as the district and appeals courts both found, the record is devoid of evidence that racial animus played any part in the adoption of the By-Law by the Town Meeting, a legislative body consisting of 270 representative Town Meeting members who held hearings and debated the matter. (Petitioner's App. 23a and 51a) (R. A57-A63 ¶¶ 62-96).

Rather, the undisputed evidence established that the By-Law in question is the last in a twenty year progression of by-laws designed to insure that commercial activities do not impinge on private, residential life, including the prohibition of the retail sale of food between the hours of 12:00 midnight and 6:00 A.M. (App., *infra,* 45a) (R. A49, ¶ 27; A428), a rollback of the closing time for licensed establishments which sell alcoholic beverages from 2:00 A.M. to 1:00 A.M. (R. A50, ¶ 29; A753-54, 774-75), the prohibition of the sale of any retail commodity (except fuel products) between 12:00 midnight and 6:00 A.M. (App., *infra,* 48a) (R. A49, ¶ 27; A428), and finally, in 1980, a by-law prohibiting the illumination of signs for retail establishments which were proscribed from operation under the earlier enacted by-laws. (App., *infra,* 50a-60a) (R. A49, ¶ 28; A429-35).

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4. In transmitting that third draft, National's counsel articulated the new assertions being pursued by him "since the Town of Dedham decided to push this case forward a few months ago" and stated that the new assertions should be discussed "prior to filing the stipulation in court" since "[o]nce the stipulation is filed, there may well be extensive press coverage and public scrutiny embarrassing to Town officials." (App., *infra,* 43a) (A57, ¶¶ 63-64; A126-52).

In addition, the undisputed record in this case reflects recurring citizen complaints to Town officials and to National, prior to adoption of the By-Law, relative to vandalism, noise, late hour traffic through residential neighborhoods, squealing tires, glaring headlights, trespassing through backyards and general late-hours disruption of the residential neighborhood adjacent to National's Showcase Cinema site (R. A51, ¶ 34; A412-14, ¶¶ 18, 19, 20; A347-48, ¶ 5; A360, ¶ 43; A161). The By-Law reasonably sought to address these complaints by limiting late night showings and their attendant detrimental effects on the neighborhood.

The district court granted summary judgment for the Town, 846 F. Supp. 1023 (D. Mass. 1994) (Petitioner's App. 39a-59a), and the Court of Appeals affirmed. 43 F.3d 731 (1st Cir. 1995) (Petitioner's App. 1a-38a).

B. The Record Below

In its zeal to demonstrate a dispute of material fact, National, in its petition, has mischaracterized the record in several critical instances. These mischaracterizations primarily center around National's racial animus claim. National's extensive deposition and discovery efforts as to essentially every person it could identify as having participated in the Town Meeting or the public debate of the proposed By-Law, yielded the single reference to race cited by National at page 5 of its petition. National at 4-5, argues from the single reference that, in 1988, "[t]he race issue immediately reared its head." However, the comment quoted was elicited during the deposition of an abutter to the cinema, taken almost four years after the 1989 adoption of the By-Law and subsequent to an intervening incident in 1991 involving the much publicized multiple stabbings of Showcase Cinema patrons by other patrons waiting for the late showing of *New Jack City* on

March 8, 1991. (R.A. 553-55 and March 29, 1981 *Boston Globe* article cited by National at 6).[5] The incident, however, could not have been a topic of discussion in 1988.

Nor does the record suggest that such comments were used by the abutter to "stir . . . up the neighborhood" as recited by National, at 5. Rather, the record cited by National (R. A1706-09) describes only the abutter's concerns about expansion of the cinema complex, additional traffic, crime, and security issues, some of which he had voiced to selectmen and police, *not to neighbors.* Moreover, the "false flyer" referred to by National, at 5, was, in fact, a document which listed Showcase Cinema incidents *exactly as they appeared on the police blotter,* and which was submitted *only to the Town Selectmen.* (R. A1706-09).

When National asserts, at 4, that "[t]he record in this case reflects that it was [racial] fear that caused Dedham to ban the Showcase 'midnight movies,' " it cites only its own tallies of patron attendance by race on several nights in the summer of 1993 with no indication whatsoever of any awareness by Town Meeting of the racial composition of late show audiences, or any reference whatsoever to race by the Town Meeting in its debate three years earlier.[6]

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5. The incident stands in sharp contradiction to National's representation at 9 n. 14 that suspension of enforcement of the By-Law against National "was in effect for 4 years and there is nothing in the record to suggest that Dedham is any the worse for it."

6. Significantly, the first investigation, and only evidence as to the racial composition of the cinema audience, was conducted by *National after* the adoption of the By-Law, and during the pendency of this litigation. The surveys National claims to rely upon were conducted as to audiences on several nights

(Cont'd)

In fact, Town Meeting emphasis on resident bargaining power by requiring National to satisfy promised traffic and security goals before coming back to the next Town Meeting for rescission of the By-Law, nullifies a theory of audience "lock-out". App., *infra*, 27a-28a, 30a-32a. *See also*, 26a.

> The vice president told us of all the things that had been done to satisfy the neighborhood and the town and all the things that they would try to do in the future. I'm sure that they will make every effort to keep their word. However, I would suggest to you, as Fred Johnson suggested, let's go ahead and keep what we voted in place. Keep what we voted two weeks ago in place and if National Amusements satisfies the needs of the residents in the town then next year I will come back here and I will ask that we rescind the action that we took two weeks ago.

(App., *infra*, 30a).

The litmus test that the focus of Town Meeting was to eliminate undesirable secondary effects, not a particular ordinance, was the expressed intention to bring back the late shows if and when those secondary effects had been controlled sufficiently to assure late night residential tranquility.

The only other contention of National's racial animus claim is its reliance on so-called "code words" — "people problems";

(Cont'd)

in the summer of 1993, four years after enactment of the By-Law. National has stated that there are no statistics as to racial attendance at the Showcase Cinemas or any attendance at late shows for the period 1988 and 1989, just prior to passage of the By-Law. (R. A62, ¶92), (R. A350, 646-48).

"young kids who don't even live in Dedham" — which National has, in its petition, *e.g.*, 6, elevated to the designation of "racial slurs," although none of the phrases refer in any manner to race, explicitly or in the context from which these "snippets . . . extracted from the record with near-surgical precision" (Petitioner's App. 24a), are taken. *See* App., *infra*, 3-4a, 6a, 26a. The entire transcript of Town Meeting debate has been provided at App., *infra,* 1a-40a.

National's assertion at 6-7, that the premise of some speakers at Town Meeting that patrons of National's mega-complex consist mainly of "out-of-towners," *see* App., *infra,* 26a, "could only reflect a visible difference like skin color" ignores the undisputed record and common knowledge that Showcase Cinema's twelve screens exhibit the same movies about twelve or thirteen hours a day, seven days a week, a volume certainly calculated to saturate more than the Town of Dedham's small population. (R. A63-64, ¶¶ 97, 98; A637-43). Furthermore, National's Vice President acknowledged that the Cinema draws from at least ten suburban and urban areas of Boston, including Dedham, Westwood, Norwood, Canton, Stoughton, West Roxbury, Roxbury, Mattapan, Needham and Milton. (R. A1588).

When National, at 13-14, finds racism in one speaker's desire "to get the trouble out of town earlier," National ignores the context in which the speaker argued to Town Meeting that "[t]welve-thirty is a very reasonable time for the parking lots to be emptied out and the people to go home." App. *infra,* 6a.

> It's going to get the trouble out of Town earlier. Perhaps its only a by-law, as Mr. Reid says, but it's a start. It shows that the people at the cinema that they're going to have to work with the area residents, and that they're going to have to get along and be good neighbors.

App., *infra*, 6a. A447.

National truly is a "neighbor" to local residents. When National suggests to the Court at 11, n. 17, that an activity that draws hundreds of late-night patrons is acceptable at 2 A.M. because the area is commercially zoned, it neglects to add record evidence that "[e]very car that enters and exits the Showcase Cinemas property does so on Elm Street or via their rear entrance onto the dirt road." (R. A1702). Property across Elm Street from National consists of single family homes, marking the beginning of the residentially zoned neighborhood immediately abutting National's theatre. *Id.*

National, in its Complaint (R. A10, ¶ 10), concedes that, prior to adoption of the By-Law, its representatives "met with Town of Dedham residents on five separate occasions" and "proposed and developed plans to alleviate any articulated concerns pertaining to traffic, noise and security at or around the Showcase Cinemas complex." National, in addressing the Town Meeting prior to adoption of the By-Law, App., *infra*, 17a-22a, 35a-39a, emphasized its efforts to address the cinema's impact on the neighboring community, including neighborhood patrols, police details, and security measures. (R. A45, ¶ 14; A52, ¶ 37; A353, ¶ 18: A219-22; A43-45, ¶¶ 8, 10-13). However, despite National's efforts, as to which the Town Meeting was fully briefed, App., *infra*, 16a, 19a-21a, 39a (R. A464-67, A493-94), neighbors continued to petition their legislators for passage of the By-Law in question to combat their experiences of theater patrons urinating on lawns, roaring cars up and down residential streets, turning in driveways and shining headlights in homes. (R. A51, ¶ 34, R. A52, ¶ 38, R. A52-53, ¶ 39).

Despite this record, National claims, at 6, that it "successfully implemented" a program responsive to neighbors concerns and asserts, at 8, that noise and "cutting through the

neighborhood" were "eliminated" by posting a "Dead End" sign. National cites for this proposition testimony of a neighborhood resident, Mr. Cedrone, who testified, however, that the cut-through problem was "alleviated", *not "eliminated"*, and Mr. Cedrone added "you'll get different opinions from people who live on that main drag." (R. A1009).

In fact, Mr. Cedrone, as Chairman of the Poor Farm Committee, (a liaison between National and neighbors formed to address problems generated by Cinema activity) described at the April 24, 1989 Annual Town Meeting

> "more people coming out of the late show cutting through the neighborhood, cutting through back yards. The eldery people still can't get used to that, even with the extra police protection." * * * "At 12:00 they're showlng movies, you're in bed. When most of you people are in bed, sleeping, you've got that serenity, you can sleep, there's no problem. The people in this neighborhood got to go to sleep. If they hear a noise outside, they're awake. They're sleeping on eggs out there."

App., *infra*, 24a-25a (R. A52-53, ¶ 39, A363, ¶ 52; A472).

Mr. Cedrone's statement encapsulizes the well recognized government interest in preserving the peace and tranquility of the home. A limited time restriction could not be a more reasonable and appropriate response to that need. The By-Law here is a classic time, place or manner regulation, demonstrated by the record to be narrowly tailored to serve the well recognized governmental interest of preserving the peace and tranquility of the home, in this instance by insuring a period of peace and quiet

from commercial activity during the early hours of the morning between 1:00 and 6:00 A.M. Accordingly, summary judgment for the Town was properly sustained.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AS TO A SUBSTANTIAL GOVERNMENTAL INTEREST OR OTHERWISE.

The By-Law in question was enacted as part of a twenty year on-going effort by Town Meeting to preserve peace and tranquility for Town citizens during the late evening hours. (*See* p. 4, *supra*). App., *infra,* 45-60a. This Court has observed that government's "interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society," *Carey v. Brown,* 447 U.S. 455, 471 (1980), and has also emphasized that the scheme of licensing and other regulation of commercial entertainent are acknowledged and accepted applications of the time, place and manner doctrine to entertainment. *Young v. American Mini Theatres,* 427 U.S. 50, 62-62 (1976).

The crux of National's grievance is with this Court's ruling, as paraphrased by the Court of Appeals, that "a legislative body, acting in furtherance of the public interest, is entitled to rely on whatever evidence it 'reasonably believe[s] to be relevant to the problem' at hand" when the focus of legislation is the secondary effects of entertainment or other speech. Petitioners App. 21a-22a, citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) and *Ward v. Rock Against Racism,* 491 U.S. 781, 800 (1989).

The standard, as articulated and applied in *Renton* and *Ward*, presents not a "fact issue," as National, at 12, asserts without supporting authority, but rather a mixed question of law and fact, requiring the Court to examine the record before the legislative body without adjudicating or requiring the legislature to independently corroborate each incident brought to its attention. Petitioner's App. 21a. *See Renton* at 51-52 ("[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever evidence the city relies upon is resonably believed to be relevant to the problem that the city addresses"); *Ward* at 800 (a city's substantial interest in limiting sound volume was satisfactorily "evidenced by the complaints about excessive volume generated by respondent's past concerts").

Consistent with that standard, the Court of Appeals found that, in addressing problems of crime, litter, and noise posed by late-night commercial entertainment activities, the Town "had ample reason to assume that the collocation of factors on display at the Town Meeting — recurrent, wide-ranging complaints lodged by residents, constabulary concern with a pattern of incidents reasonably believed to have occurred in connection with the exhiition of midnight movies, and a common sense realization that the placidity of a residential community will be jeopardized by an activity that regularly draws hundreds of late-night patrons, most in automobiles, who must then depart in the early morning hours — were relevant to, and probative of, its assessment of the problem." Petitioner's App. 22a.

With an eye, perhaps, to the envelope surrounding its profit potential in the cinematic sector, National, at 16, dreads that "any late night First Amendment activity with an appreciable public facet is vulnerable to a ban." The simple answer to National is that this case does not present a "ban", and reasonable restrictions on

the time, place or manner of protected expression will be upheld so long as they are content neutral, narrowly drawn to serve a significant governmental interest, and allow for reasonable alternative channels of communication. *Ward v. Rock Against Racism, supra,* at 791; *Renton v. Playtime Theatres, Inc., supra,* at 50; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Both the district and appeals courts found that each of the stated elements were satisfied by the subject By-Law. Petitioner's App. 30a and 59a.

Turner Broadcasting System, Inc. v. Federal Communications Commission, __ U.S. __, 114 S. Ct. 2445 (1994) and *Edenfield v. Fane*, __ U.S. __, 113 S. Ct. 1792 (1993), relied upon by the petitioner, require no more. Both merely looked for concrete experiences to support the abstract governmental interests put forward in those cases and found none on the record. (*See* further discussion at p. 19, *infra*).

Here, the evidence of direct experiences by town residents is not only real and substantial but, in the language of the Court of Appeals, "overwhelming."[7] Petitioner's App. 22a n. 10. *See* Petitioner's App. 19a-20a, describing certain "key pieces of evidence."

The By-Law, effectively eliminating opportunities for

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7. Petitioner's reliance on the cases cited at 13, n. 18 is, therefore, inapposite. Those cases are conspicuous in their lack of supporting experiences, *Baseardones v. Galviston*, 682 F.2d 1203 (5th Cir. 1982); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981); *Leverett v. Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985), the direct articulation on the record of an impermissible motive to suppress the content of adult entertainment, *Leverett v. Pinellas Park, supra; Kuzinich v. Sonta Clara*, 689 F.2d 1345 (9th Cir. 1982), or the complete absence of even a rational basis for the singling out of communicative activities. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

disruptive and unruly behavior on the part of National's patrons during the early morning hours, reflects a common-sense approach to addressing the recurring complaints of neighbors relating to late-night noise, vandalism and disruption. *Ward*, 491 U.S. at 801 (absent this requirement, the City's interest would have been served less well, as is evidenced by the complaints . . . generated by respondent's past concerts").[8]

National, at 3 and 7, claims that complaints made by citizens in 1989 of squealing tires, trespassing through back yards, noise, litter and general late hour disruption of the neighborhood were "recanted or materially modified" at depositions in 1993. National's citation to the record, however, shows nothing of the sort. *See* petition at 7-9. In fact, National's reference at 8 n. 9 to the details of various occurrences from compilations of police reports — a so-called "lug-nut" incident where all four wheels were removed from a car and a so-called "jacket" incident where youths were stripped of their jackets at knife point (*see* App., *infra*, 26a) — confirms such incidents while quibbling as to the hours or day of their occurrence and with the legislative determination that secondary effects of National's business experienced during the day and evening hours need not be perpetuated into the wee hours of the night. Contrary to National's contentions, at 9 n. 12 and 8 n. 10, late-show patrons need not be *more* boisterous than early show patrons to be more problematic at 2:00 A.M. and the noise and disruption of 350 exiting cars at 2:00 A.M. pose a far different burden to a residential neighborhood than the same activity does at noon.

At some hour of the night, privacy interests must become paramount. *See Wisconsin Action Coalition v. City of Kenosha,*

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8. Indeed, the Town might argue (though under the applicable standard it is not required to do so) that adoption of the By-Law may well reflect the *only* realistic method of protecting Town citizens from late-night noise and disruption, given other unsuccessful efforts.

767 F.2d 1248, 1258-59 (7th Cir. 1985) ("City's interest in protecting the privacy and peace of its residents increases (perhaps geometrically with the lateness of the hour.")). The Town Meeting reasonably determined such hours to be from 1 A.M. to 6 A.M., consistent with its past regulations of commercial activities designed to afford a period of residential sleep and respite. App., *infra*, 40a.[9]

It appears that, three years into the litigation, the agreed statement of facts proposed by the Town, analyzed in this context of existing law concerning reasonable "time, place or manner" restrictions, apparently stirred in National a sense of desperation,

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9. Nor is the By-Law overbroad in its application to other businesses, as asserted by petitioner at 17 n. 22. The By-Law, on the basis of the Town's actual experience of the secondary effects of Showcase Cinemas' operations on the surrounding residential community, identifies a class of licensed commercial activities which, by their nature, are intended to draw crowds of people. The form of entertainment is irrelevant; all can reasonably be expected to produce secondary effects similar to those which so negatively affected the neighborhood surrounding Showcase Cinemas. Regardless of the noisiness of a particular form of entertainment in and of itself, if enterainment is promoted as a commercial activity to earn admission fees, Petitioner's App. 61a-69a, that activity poses problems associated with all commercial activities which need to draw certain numbers of people in order to be profitable. These secondary effects are particularly burdensome in the late hours of the night and early hours of the morning, interfering with neighbors' sleep and the late night tranquility residents in a suburban community expect. Thus, because here the focus is on "secondary effects," the charge of a fee in anticipation of sufficient crowds to justify the commercial enterprise is precisely relevant to a narrowly tailored by-law protective of residents' interests, "and since the market for [such amusements] as a whole is 'essentially unrestrained,' the regulation . . . is not broader than essential to the furtherance of those interests." *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1121 and n. 6 (1st Cir. 1981), citing *Young v. American Mini-Theatres*, 427 U.S. 50, 62-63. *Cf. City of Boston v. Back Bay Cultural Association*, 418 Mass. 175, 183-84 (1994), cited by Petitioner at 17, where the regulation, unlike the By-Law here, extended to non-commercial speech as well as commercial speech.

leading to its belated allegation that racial animus motivated the Town in adopting the By-Law. App., *infra,* 43a (R. A57, ¶¶ 62-64), (A70-79, 126-52). Both the district and appeals court rejected that claim, however, because the record is devoid of evidence that a racially discriminatory purpose motivated enactment of the By-Law. Petitioner's App. 23a and 51a. *Washington v. Davis,* 426 U.S. 229, 240 (1976) ("the invidious quality of a law claimed to be racially discriminatory must be traced to a racially discriminatory purpose.") (R. A57-63, ¶¶ 62-96).

National has the burden of proving the existence of purposeful discrimination. *McCleskey v. Kemp,* 481 U.S. 279, 292 (1987) and cases cited. Moreover, "[d]iscriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 279 (1979) (citation omitted); *Church of Lukumi Babalu Ave. Inc. v. City of Hialeah,* __ U.S. __, 113 S. Ct. 2217, 2231 (1993).

Thus, National has the burden of establishing that the By-Law was adopted in this case "*because of* an anticipated racially discriminatory effect." *McCleskey v. Kemp, supra,* 481 U.S. at 298 (emphasis in original). This National is unable to do, for the voluminous testimonial evidence establishes the notable lack of a racial motive, or even an *awareness* of the racial composition of the late movie audience, on the part of the 270 member Town Meeting, which voted to adopt the By-Law, or any of the members of the Board of Selectmen who sponsored the By-Law and supported the By-Law at Town Meeting. (A57-63, ¶ 62-96). *See* discussion, *supra* at 5-8.

As the transcripts of Town Meeting debate indicate, even National, when provided with ample opportunity on two occasions to address the Town Meeting at length, during the course of its debate of the By-Law and prior to votes taken thereon, neglected to raise or even allude in any fashion to a racial or otherwise improper motive, the racial mix of its late show patrons, or the anticipated impact on those patrons of the By-Law under discussion, although he was quite willing to threaten the Town Meeting with costly litigation and to allude to "the intention of our company to go to war, so to speak, with the Town of Dedham" over the "economic impact on our business." App., *infra,* 17a-22a, 35a-39a. (R. A462-69, A492-93).

Although the district court, indulging every inference favorable to National as the non-moving party, accepted National's "secret and invidious survey" of patrons by race, Petitioner's App. 45a n. 3, arguendo for summary judgment purposes as probative of "the racial mix of Showcase audiences," *Id.* 51a, it noted, at Petitioner's App. 54a-55a, that, in addition to lacking any nexus to Town Meeting knowledge and motivation, "the entire claim of 'disparate impact' rests on a logical fallacy" since the written survey of reasons for late night attendance did not identify patrons by race. "For all that appears, the effect of closing down the late shows is identical for each patron and his or her alternative entertainment options are identical regardless of race. There simply is no disparate effect along racial lines . . ." *Id.* at 54a-55a.[10]

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10. Even assuming *arguendo,* the relevance of statistics allegedly reflecting the racial composition of late movie patrons *after* adoption of the By-Law, a "naked statistical argument" will not suffice to invoke strict judicial scrutiny; otherwise, "each difference in treatment . . . [would be rendered suspect], however lacking in racial motivation and however . . . rational the treatment might be." *Jefferson v. Hackney,* 406 U.S. 535, 548 (1972) (holding that a statistical deviation alone will not suffice to invite close judicial

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Although the record "does not contain the slightest indication that the race of theatregoers was an issue" and "all the evidence supports Dedham's assertion that Article 4 was aimed principally at curbing late night disruptions," Petitioner's App. 24a, National, at 18, demands a trial on the basis of an alleged factual dispute arising out of the use of the so-called "code words" which National now labels "racial slurs." National proposes to supplement the legislative history consisting of verbatim transcripts of Town Meeting, App., *infra,* 1a-42a (R. A439-97), through expert testimony that Town Meeting members and other participants in the debate said something other than what they actually said and, in the inner recesses of their subconscious, meant something different and more sinister than what they actually voiced. From that, National hopes to persuade a fact-finder to infer that the 270 member Town Meeting, after hearing full debate in favor and against the By-Law, acted with a collective sinister and impermissible racial motive which at no time was ever voiced.

The proffered theory fails to meet even the most basic criteria of Fed. R. Evid. 104(a), Petitioner's App. 55a, and fails to present a trialworthy issue. *Celetex Corp. v. Catrett,* 477 U.S. 317, 324 (1986); *Turner Broadcasting System. Inc. v. FCC,* __ U.S. __, 114 S. Ct. 2445, 2464 (1994) (" '[i]t is a familiar principal of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive' ").

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scrutiny). *See also, Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 267 (1977) (noting that "the historical background of the [governmental] decision is one evidentiary source" for determining the presence of a discriminatory motive; however, although the impact of the Village's refusal to change zoning to allow for construction of integrated low-and moderate-income housing "[did] arguably bear more heavily on racial minorities, . . . there was little about the sequence of events leading up to the decision that would spark suspicion"). *Id.* at 269.

National's cry of "sham" is baseless. The By-Law, on the undisputed record, is a content-neutral, limited time regulation, designed to serve a substantial governmental interest, narrowly tailored in the service of that interest, and leaving open ample avenues of communication. Therefore, the Court of Appeals correctly sustained the district court's grant of summary judgment.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT, THE NINTH OR THE ELEVENTH CIRCUITS.

Neither *Turner Broadcasting Systems Inc. v. Federal Communications Commission*, __U.S.__, 114 S. Ct. 2445 (1994) nor *Edenfield v. Fane*, __U.S.__, 113 S. Ct. 1792 (1993), cited by the petitioner, conflict with the decision below. Both look for factual support as to governmental interest of an *abstract* nature. This Court, in *Turner*, while emphasizing, at 2471, that the legislature "is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review," was confronted with an abstract economic regulation, largely theoretical, and was, hence, unable to determine from the legislative record provided whether a concrete problem currently existed (in the form of a threat by cable TV to the health of local broadcasting) and whether the proposed remedy of protecting local broadcasting would, in the language of *Ward, supra*, at 799, "be achieved less effectively absent the regulation" imposing "must carry" provisions upon cable systems. *Turner* at 2469-2470. Similarly, in *Edenfield*, where the dangers of fraud, overreaching, or compromised independence of C.P.A.s, if allowed to solicit clients in person, were entirely theoretical, intermediate scrutiny could not be satisfied by a "record [that did] not disclose *any* anecdotal

evidence" derived from experience. *Edenfield* at 1800 (emphasis added).[11] To the extent the Court's search for something "substantial" in those records can be read to require a by-law of this nature to pass a "substantial evidence" test, the By-Law here, on the basis of the record below, does. *See Turner* at 2469, citing with approval *Ward v. Rock Against Racism, supra,* where resident complaints satisfied intermediate scrutiny.

National's frustration stems not from any lack of convincingly concrete experiences of secondary effects by the Town[12] but rather with the Court of Appeals' reiteration of the *Renton* standard in ruling that "a legislative body, acting in furtherance of the public interest, is entitled to rely on whatever evidence it 'reasonably believe[s] to be relevant to the problem' at hand." Petitioner's App. at 21a and n. 9, *citing Renton v.*

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11. It is interesting to note that petitioner relies primarily on cases based upon theoretical economic regulations which, of necessity, cannot be understood apart from some level of statistical analysis. *See Los Angeles v. Preferred Communications. Inc.,* 476 U.S. 488 (1986) and *Home Box Office v. FCC,* 567 F.2d 9, 36 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977). Outside the realm of cable and broadcasting regulation, and contrary to petitioner's suggestion at 15, n. 21, studies have not been a required basis of legislative restrictions on speech. In *754 Orange Ave., Inc. v. City of West Haven,* 761 F.2d 105, 112, n. 6 (2nd Cir. 1985), cited by petitioner, the court focused upon *both* the absence of professional analysis of the impact of adult book stores on urban life *and* the absence of direct experience of an increase in such businesses in contrast to experiences of the City of Detroit relied upon in *Young v. American Mini Theatres,* 427 U.S. at 54-55 and n. 8. In *Avalon Cinema Corp. v. Thompson,* 667 F.2d 659, 661 (8th Cir. 1981), the record was deficient because it was not based on *either* "studies by social scientists, *or* on a demonstrated past history of 'adult' theatres' causing neighborhood deterioration." (emphasis added).

12. In fact, the Town Meeting did police itself through its legislative process of debate, where various speakers scrutinized the reasonableness of certain comments regarding broken windows at Papa Gino's referred to by National. App., *infra* 16a (R. A1888-89).

Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986) and *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). Although National, at 14, bridles at the suggestion that it is asking the Court to require a legislature to "conduct ... an independent investigation and corroborate ... each incident" before acting in response to citizen complaints of secondary effects upon residential peace and tranquility, National's argument boils down to just that. *See* Petition at 14, 15, 20. The consequences of such requirement, however, would be the elimination of reasonable, content-neutral "time, place, or manner" methodology from the legislative process by requiring prior adjudication of the facts supporting each enactment, a requirement which *Turner*, at 2471, emphatically negated.

National, at 16, insists that regulatory action must be premised upon a direct correlation between documented incidents and the hours of the late shows, claiming that the First Circuit, in failing to insist upon such direct documentation, is "flatly in conflict with ... the Ninth and Eleventh Circuits." *Citing Acorn Investments, Inc. v. Seattle*, 887 F.2d 219, 224 (9th Cir. 1989) and *Krueger v. Pensacola*, 759 F.2d 851, 855 (11th Cir. 1985). In so arguing, National overlooks the guiding principal that the correlation must be reasonably related to the articulated governmental interest, *Edenfield v. Fane, supra*, 1798 ("unlike rational basis review, [intermediate scrutiny] does not permit us to supplant the precise interests put forward by the State with other suppositions."); *Clark v. Community for Creative Non-Violence, supra*, 297; *Acorn*, 224; *Krueger*, 854-55. That interest is not, in every instance, strictly the prevention of crime. Since crime in peep show booths and crime at topless dancing establishments were the exclusive governmental focus of the regulations in *Acorn* and *Krueger*, respectively, a direct correlation of criminal activity with those events was necessary to serve the articulated governmental interest in those cases and was not shown to exist. *Acorn*, at 224 (governmental interest advanced not supported by even city's own evidence); *Krueger*, at 855.

Here, where the governmental focus is on late night residential peace, National's emphasis on crime counting ignores the fact that not all "secondary" or detrimental effects upon the surrounding community (noise, litter, shining headlights in homes, and roaring cars) show up on crime logs. Many such incidents, particularly if recurring, may take the form of calls to selectmen, submittal of petitions or appearances at selectmen's meetings and Town meetings. (R. A42-43, R. A51-56, ¶¶ 4, 5, 8, 34-61).

Nor does National acknowledge that impacts from its late movies — some of which begin as early as 11:30 P.M. — may generate lines and other patron activities as early as an hour before, with peak traffic at midnight, and may span a broader period than the 1:00 A.M. to 6:00 A.M. period during which continued exhibition is prohibited. (R. A56, ¶ 61).

In short, National wishes to use the very self-restraint employed by the Town in fashioning its narrow remedy as a sword to attack that remedy by focusing only upon crime reports for the narrow period when exhibition is prohibited and ignoring the very secondary effects preceding and following such exhibition which the By-Law is designed to address.

Moreover, the record in *Krueger,* in marked contrast to the present record, "establish[ed] with unmistakable clarity the actual motives of the legislators" to be impermissibly content-based in light of "debate focused entirely on the morality of topless dancing and the propriety of having such activity going on next to a church." *Krueger* at 856.

The standards articulated in *Acorn* and *Krueger* are entirely consistent with those applied by the First Circuit to the record at hand.

CONCLUSION

The "fundamental questions" raised by petitioner, at 19 and 11, n. 16, as meriting review by this Court have been dispositively addressed in previous decisions of this Court and consistently applied throughout the circuits. A governmental interest warranting enactment of a content-neutral restriction upon the time, place, or manner of speech is manifested as more than theoretical when a problem is identified by wideranging reaction to and concern about direct experiences, brought to legislators' attention in the form of complaints, and disclosed by the record to be "reasonably believed to be relevant to the problem . . . address[ed]". *Renton v. Playtime Theatres, Inc., supra,* 51-52; *Ward v. Rock Against Racism, supra,* 800.

Neither "legislative hearings [nor] findings," Petitioner p. 19, are required. *Turner Broadcasting System, Inc. v. Federal Communications Commission, supra* 2471. Legislative debate provides the checks and balances as it did here. Far from a "political melee," as labeled, at 19, by petitioner, the Town Meeting here reopened debate to hear additional sides of the issue, App., *infra,* 12-15a and 35a (R. A1888-89) and a session of that Town Meeting, upon learning that National's representative had been unavailable to attend a previous Town Meeting session, voted 161 to 33 to reopen and reconsider the matter "so that we can hear the proponents and opponents of that bill tonight in its entirety and at least give a fair chance to the businessmen of the community to put their side of the story forward." App., *infra,* 13a (R. A455).

Since the record of Town Meeting debate manifests "overwhelming" support for Town Meeting's action on its stated concern, Petitioner's App. 22a n.10, — a stated concern in protecting residential peace and tranquillity long recognized to be an interest "of the highest order in a free and civilized society,"

Carey v. Brown, supra, 471, — and since petitioner's strategic interjection of an alleged illicit racial motive is revealed to be a phantom, maliciously conceived as a desperate gamut to keep the case alive, finding no substance in a record which "chronicles the lengthy series of events incident to the Town's consideration of [the By-Law] and does not contain the slightest indication that the race of the theatregoers was an issue," Petitioner's App. 24a, summary judgment upholding the By-Law was correctly sustained and National's petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPT FROM THE RECORD: TOWN MEETINGS MINUTES, APRIL 10, APRIL 24, AND NOVEMBER 6, 1989

[stamped]
A TRUE COPY ATTEST:
s/ Margaret M. McGowan
Town Clerk

DEDHAM ANNUAL TOWN MEETING
MONDAY, APRIL 10, 1989

DEDHAM HIGH SCHOOL AUDITORIUM

H. HOLTON WOOD, MODERATOR

[Commencing at Page 90]

amendment?

(Seconded)

MR. MODERATOR: Now, we're chalker block full of amendments, and we can't go any further, so the vote would come first on the tabling motion that this Article be tabled until April 24, till the meeting on April 24. Is there a second to that, please?

(Seconded)

MR. MODERATOR: Will all those in favor please say aye.

(Aye)

MR. MODERATOR: Those opposed?

Appendix A

(No)

MR. MODERATOR: It is a vote; therefore, we will not act on that at the moment. Now we can move to Article 40, which you find on page thirty-one of your warrant. What is the recommendation on this?

MRS. KEHOE: There's a substitute.

MR. MODERATOR: Well, actually, it doesn't need to be a substitute motion, because there is no motion at this point. This is the motion by the Board of Selectmen and, Mr. Maggioni, it's not a substitute motion. It's the motion, isn't it, because it said a [91] recommendation would be made at the meeting, aren't I reading that correctly?

MR. MAGGIONI: The FinCom has made no motion on it so far, and I don't see anything in this booklet here about it.

MR. HORRIGAN: No, I haven't seen the substitute motion. We were prepared to indefinitely postpone it during our budget hearing, and we were asked by the Board of Selectmen to defer action on it. We have heard nothing since then.

MR. MODERATOR: The Finance Committee's motion was indefinite postponement, right; is that right? Is there a second to that?

(Seconded)

MR. MODERATOR: Then there is a motion, a substitute motion by the Board of Selectmen which I will read to you right now.

Appendix A

That Chapter 13 of the Town Bylaws be amended by adding the following new section: Section 42B, no holder of an entertainment license for theatrical exhibition, public show, public amusement, dance, except ballroom dancing by patrons and instructors, or exhibition pursuant to General Laws, Chapter 140, [92] Section 181, or 183a, shall conduct business between the hours of 12:30 a.m. and 6:00 a.m. This Bylaw shall not apply to the sale of food or alcoholic beverages to be consumed on the premises at which they are sold when such sale is by a licensed common victualler previously engaged in the sale of food to be consumed on the premises.

Is there a second to that motion, please?

(Seconded)

MR. MODERATOR: Mrs. Kehoe, please.

MRS. KEHOE: Thank you, Mr. Moderator. This is another article that the Board of Selectmen unanimously supports. And let me give you just a brief overview of why we have brought this before you this evening.

On the corner of Route 1 and Elm Street we have the Showcase Cinema, a multi theater development, and I will say that perhaps it brings a better approach to the town than something else that could have been constructed there, but it has brought with it a tremendous amount of traffic. The generation of that traffic has been immeasurable. Beyond traffic problems, we've had people problems. Let me be very [93] clear that the management of the cinema has employed private details from our Police Department, has their own security personnel there, and in spite of this positive action there is still need to call upon the

Police Department itself to remedy the people problems, and they are many, many, many.

In addition to those kinds of things, we've had an overall environmental adverse environmental impact on the neighborhood. These problems have been discussed before the Board of Selectmen, by the neighborhood, at great length and many, many times. The neighborhood has had a meeting recently, developed a petition signed by all the neighbors indicating that they are in agreement with the Board of Selectmen's proposal in the original proposal called for a midnight closing. In other words, the theatre complex would be emptied by midnight. We wouldn't have any more shows letting out at two and three o'clock in the morning, which is part of our problem. We want to control the environment.

In this particular neighborhood, a very small community has suffered terribly from this imposition. As recently as last Thursday evening the [94] representatives from National Amusement met with the neighbors and with the Board of Selectmen and the principals told us of the difficulties in exiting the theater all at once at midnight. So, as a concession, the neighborhood agreed to a twelve thirty closing so that the exiting could be staggered.

This is going to help, not only that immediate neighborhood, but the entire town. The exitus onto Route 1 is unbearable. The reverse of the traffic back on Elm Street, Rustcraft Road, and ultimately East Street, has caused a constant disturbance; one o'clock, two o'clock, three o'clock in the morning. It seems to me that healthy entertainment should be over by twelve or one o'clock. And I guess maybe I'm playing the roll of mother in wondering why these young kids, who don't even live in Dedham, should be attending the cinema and starting home at two

or three o'clock in the morning, and damaging property belonging to property owners in the area. It's become extremely serious.

We believe truly that if you people would support this amendment it will be most helpful. I don't know if anyone is here this evening from the [95] neighborhood. The petition is available and we would really ask your very sincere consideration in the acceptance or the support of this Article. Thank you very much.

MR. MODERATOR: Thank you Mrs. Kehoe. Mr. Reid.

MR. REID: I support this Article on behalf of the selectmen, but I think there are several problems with it. First of all, would this affect the Holiday Inn, would it affect J.C. Hillary's, would it affect any other establishment that has an entertainment license. It wouldn't prohibit them from serving food or alcohol, but you certainly wouldn't be able to go and listen to a band or to dance, or anything at one of those locations.

The other thing is, by virtue of being a bylaw, the fine is $50.00 for an offence. If you think a $50 offence per night by being a bylaw violation is going to stop National Amusements from running a show after midnight, I don't think so. The other problem is the time factor of what happens if it's eleven thirty, twelve o'clock, twelve thirty for a show? Movies today run various lengths, and I don't [96] know how they're going to fit them in. In order to do so, they probably have to start the shows earlier, which means that at rush we're going to have greater congestion.

I think that there are some problems with the Article, although I'm generally for it, but I don't want to have it put in

teeth, and that it does, in fact, affect some businesses in town that depend upon that for their livelihood, such as perhaps the Holiday Inn or J.C. Hillary's which do have live entertainment and operate under an entertainment license. Thank you.

MR. MODERATOR: Thank you. Yes?

MR. JOHNSON: My name's Frederick Johnson, I'm the Chairman of District 6, and this was the first thing I got involved in after I was elected Chairman. I attended several area meetings with the residents of the area; Robinwood Road, Elm Street, and quite frankly they've been working with the people from the cinema. Mr. Towey is to be commended. He's a very professional man, and they tried to work with the area residents.

[97] In return for letting the cinema stay open to just twelve thirty, and help them out, Mr. Towey is willing to look at perhaps doing some other things to help the people in the neighborhood. This is for the people in that little area of town that are stuck, they're stuck between the highways, the cinemas, they got N.D.A. coming. All they're asking for is a little break. Twelve thirty is a very reasonable time for the parking lots to be emptied out and the people to go home.

I mean, the residential people in this town deserve a break. I know one thing, I wouldn't want the cinema across the street from me. It's bad enough that the land values of these people's property is probably going to start to decrease in the future, but something like this is only going to be good for the neighborhood. It's going to get the trouble out of town earlier. Perhaps it's only a bylaw, as Mr. Reid says, but it's a start. It shows that the people at the cinema that they're going to have to work with the area residents, and that they're going to have to get along and be good neighbors.

They appear to be making those kinds of strides, and I think this Article is [98] excellent. I urge you to support it. Thank you.

MR. MODERATOR: Thank you. Mrs. Kehoe, please.

MRS. KEHOE: Just in response to Mr. Reid's question. I want to assure everyone that concerts are not included in this Article, nor is ballroom dancing. We're not interested in eliminating healthy entertainment that certainly ceases long before 3:00 a.m. So those are not a part of this Article.

No holder of an entertainment license for theatrical exhibition, public show, public amusement, dance, except ballroom dancing by patrons and instructors, or exhibition pursuant to the General Laws, Chapter 140, Sections 181 or 183a, shall conduct business between the hours of 12:30 a.m. and 6:00 a.m. This Bylaw shall not apply to the sale of food or alcoholic beverages to be consumed on the premises at which they are sold when such sale is by a licensed common victualler previously engaged in the sale of food to be consumed on the premises.

MR. MODERATOR: Yes, there's a gentleman here, please.

MR. SULLIVAN: Thank you again [99] Mr. Moderator. John Sullivan, District 8. For your information, to reinforce Mrs. Kehoe's statement, that parking lot holds almost two thousand cars. One thousand nine hundred and sixty-two cars. The only lot larger than it in the entire Town of Dedham is the Dedham Mall, which holds two thousand eight hundred cars.

So, if you can imagine two thousand cars in your own neighborhood coming out of the theater burning rubber, screaming down the highway and raising general hell, if you live

near that theater, I ask you, as Ed McGonagle asked you earlier in the evening; please, everybody think as one town. Think of all the people that live in that area and have compassion for them, consideration for what they have to go through every damn night in the week. Three hundred and sixty-five days a year they're enduring this, and I think they're tremendous to have endured it so long.

This past week sixteen windows were smashed in Papa Gino's Plaza. Were you people aware of that; sixteen windows. Can you imagine the value of those windows in Papa Gino's Plaza? I think it's outrageous. This happened at 3:15 in the [100] morning; so those were the characters that came out of the theater. This is what they do, they go around stealing cars, smashing windshields in, and smashing other people's property up. I ask you, please, support this motion. Thank you.

MR. MODERATOR: Thank you. Yes, this lady here, please.

MS. DE AVILA: Gayle DeAvila, District 3. You know, there seems to be a problem here with this twelve thirty. It seems that we're giving in again to a development that started out with just a few theaters, and now is up to number ten theaters. I don't know how many more times they can dissect that building to get more theaters. I just feel that they're being a glutton over this whole thing, and why do we have to go to twelve thirty? Why can't they stop their movies in such a way that they get out at eleven thirty, so by twelve o'clock it's all over with.

MR. MODERATOR: Yes, thank you.

MR. JOHNSON: Ladies and gentlemen, Frederick Johnson, District 6. While I am an area resident, I also understand that we have to be responsible in dealing with businesses.

National [101] Amusements have been very good neighbors to the people as best they can up there, but they're there to make money and to run a business. Trying to close them down at eleven thirty is just going to make things worse. As the profits go down, they're not going to make the improvements they promised to those area residents, okay.

You live in District 3, Ma'am, I can understand that, but these people live right up next to that theater, and they've gone through some long negotiating periods with the people from National Amusements; they've worked very hard to come to a mutual understanding agreement everyone can live by. I was at the meeting held at the Board of Selectmen's office last Thursday afternoon. Mr. Towey met with the neighbors, they came to a mutual understanding that they could both live with, and I think it's only fair that Town Meeting support the agreement these people made. If we try to push it back it's unfair to National Amusements, and it's going to turn out to be unfair to the residents of Robinwood Road and Elm Street, because they're going to be the ones that take the brunt of any action that National Amusements would [102] take if we hurt their business that badly. Thank you.

MR. MODERATOR: Thank you. I think we've had pretty good discussion on this item. There's a gentleman here who does want to speak. I guess we'll give him the right, and then we'll move to the vote.

MR. PUNGITORE: Hi, my name's Tony Pungitore. I'm from National Amusements.

MRS. KEHOE: He didn't ask permission to speak, Mr. Moderator.

MR. MODERATOR: What's that?

MRS. KEHOE: He didn't ask permission to speak, Mr. Moderator, did he?

MR. MODERATOR: Are you a resident of the town?

MR. PUNGITORE: No, I'm not a resident of the town.

MR. MODERATOR: No.

MR. BROWN: I'd like to hear what the man has to say. I am a Town Meeting Member, and I'd like to hear what he has to say.

MR. MODERATOR: Thank you Mr. Brown. Go ahead.

MR. PUNGITORE: Well, I just wanted to [103] mention that National Amusements does want to address this issue, but we didn't expect the Article to be discussed tonight. If it could be postponed we would —

(No)

MR. PUNCIGORE: — love to have someone return. Would that be possible?

(No)

MR. MODERATOR: It depends on the vote. I guess you've got to put it to the vote. Now we come to the vote on the substitute motion, which I would be pleased to read if you would like it again. I think perhaps everybody has the gist of it, so we can go ahead and vote it. It requires a simple majority vote.

Will all those in favor of the substitute motion kindly say aye.

(Aye)

MR. MODERATOR: Those opposed? It is a vote. Thank you. Now we move to Article 41, and is there a motion on that? If there is no discussion on Article 41, the motion is that it be so voted. Will all those in favor please say aye.

Appendix A

A TRUE COPY ATTEST
s/ Margaret M. McGowan
MARGARET M. McGOWAN
TOWN CLERK

DEDHAM ANNUAL TOWN MEETING

MONDAY, APRIL 24, 1989

8:00 P.M.

DEDHAM HIGH SCHOOL AUDITORIUM

H. HOLTON WOOD, MODERATOR

* * *

[Commencing at Page 41] which have not been passed, are now voted. Will all those in favor say aye.

BODY: Aye.

MODERATOR: Contra minded? It is a vote, thank you. Now, we can — Yes?

MR. ERNEST REID: Ladies and gentlemen of the Town Meeting, my name is Ernest Reid, I'm with District 4.

Last week in the confusion of Town Meeting we voted on a warrant article. That warrant article which came before us last week was, I think, untimely to the extent that the proponents of the article were not notified to be here due to the fact that it was expected that we would be discussing the financial aspects of the article last week and continue on this week. Even in some of my

aberrant requests before this body I have always found an inherent sense of fair play. To that end I would like to request that reconsideration be made to reopen article number 40, so that we can hear the proponents and opponents of that bill tonight in its entirety and at least give a fair chance to the businessmen of the community to put their side of the story forward.

[42] I just don't think they had the opportunity. They showed up last week and it was late and I just think in fair play we should do that. I would like to request this town body's assistance.

MODERATOR: Is there a second to reconsideration? (Seconded)

More than one hour has expired since the vote was taken on article 40. Hence, to reconsider requires a 2/3's vote. Reconsideration also — I think I'm correct, Mr. Maggioni, does not permit debate, does it?

MR. MAGGIONI: No. — Yes, there can be debate on reconsideration —

MODERATOR: I guess there can be debate on reconsideration but you've go to — the only thing you can do on reconsideration is state the reasons for reconsideration and not get into the meat of the article itself.

MR. MAGGIONI: Exactly.

MODERATOR: Since — Yes?

MR. CHAFFEE: I'd like to speak to reconsideration.

MODERATOR: Would you come forward, please, Mr. Chaffee, so that everybody can hear you.

[43] MR. CHAFFEE: Speaking to reconsideration only, I happen to agree with Mr. Reid that having brought these people before the Board of Selectmen some three of four times last year, they did everything that we asked them to do. Many of the things we asked them to do they did not have to do, and I think it only fair that we at least hear their side of the story.

I am not speaking to the article, pro or con, but I think we — in the sense of fairness, we should listen to what they have to say, as they were not allowed to speak at the last hearing of this meeting.

MODERATOR: Thank you, Mr. Chaffee. Now —

MR. FREDERICK JOHNSON: I'd like to speak to reconsideration, or against it.

MODERATOR: Go ahead.

MR. FREDERICK JOHNSON: Frederick Johnson, District 6 Chairman. As far as reconsideration goes this article was discussed at length last week. The various sides were brought forth and apparently we — whoa, whoa, whoa, wait a minute. The amusement people were not allowed to speak, but at the same token, they were allowed to be here, they were in here. The issue was discussed and that should be it. Thank you.

[44] MODERATOR: Now, the question before the house is for reconsideration, which requires a 2/3's vote. Hence, we'll have to ask for a standing vote on article 40.

Appendix A

Will all those who favor reconsideration of article 40 kindly stand and remain standing until you're counted. Please make sure you are counted. Thank you.

(Tellers take count)

MODERATOR: Will those District Representatives who are opposed to reconsideration kindly stand and remain standing until you've been counted. Thank you.

(Tellers take count)

MODERATOR: Ladies and gentlemen of the Town Meeting before I give you the vote let me tell you that there is a grey sedan outside, which is either a Ford or a Cougar, license number 317 FKM. 317 FKM. The lights are on in that vehicle, so it might be well for the individual to go out and turn them off. Thank you.

Now, 194 Town Meeting members, or District Representatives voted on reconsideration, 161 having voted in the affirmative and only 33 in the negative. [45] It is a vote, so we move now to reconsideration of article 40. Yes, Mr. Reid, please.

MR. ERNEST REID: Let me thank you for your sense of fair play here tonight. The article in question, article 40, did a couple of things for me that I felt were out of context. And then the day after Town Meeting, or a day or so thereafter I received a letter from a gentlemen, the Executive Vice-President of National Amusements.

First of all, I was concerned with the fact that there should be no dancing other than ballroom dancing. I don't know, somebody

here might like to boogaloo, or do a foxtrot, but we're not allowed to do that after midnight. That could seriously effect our high school graduating seniors, if they wanted to do something in the Town of Dedham after that.

The statement was made last Town Meeting that all the windows that Papa Gino's plaza were broken by patrons of the cinema. I don't think there's been any evidence, either by the police department, or any other individual that those windows were broken by people from the cinema. As a matter of fact, I think anybody getting out of the cinema at 12:30 or one o'clock would [46] be crazy to drive to Papa Gino's plaza, which is closed, get out of their car, throw rocks at windows, get back in their cars and take off. I just don't think it happened that way.

Now, when I received the letter from — I hope I'm saying his name right, Mr. Towle — I called him and I said — right off the top of my head I said, "Can you tell me what you've done for the Town of Dedham?" I believe — I would like to recognize him to speak in a moment, but before I do I would like to go in to several things.

National Amusements have contributed to the Town of Dedham in the following way: They have purchased a van for police used to patrol the neighborhood and the parking lot of the cinema at their expense; marked with blue lights, manned by police officers who they pay on detail. They got approval from the state Department of Public Works to put a police officer on the lights of Route One at Elm Street to control the traffic, at their expense. They pay private security, at their expense. They pay a clean-up detail to go through the neighborhood, at their expense.

[47] What do they donate to the community? The Drug and

Alcohol Advisory Council get the use of their cinemas for free. The Dedham Cleanup Day got the use of their cinema and some other assets of the cinema. They contributed to the Dedham High School yearbook, the Dedham High School sports calendar, the Dedham High School band uniforms. They contribute to the Dana Farber Jimmy Fund, the Will Rogers Fund, the Neurofibromytosis Foundation, Saint Katherine's and Saint Mary's Schools, Sacred Heart School, Westwood High School, Horizon House, McLean Hospital, Jewish Rehabilitation Center for the Aged. And the list goes on and on and on here. These are donations made by these people to be a good neighbor.

The question is, are we being fair when we don't allow them to speak, number one, and number two, by curtailing their business? I'm also concerned with the fact that if we come in after the fact and say to a man, "You're not entitled to use your property to full benefit", I believe he's entitled to an abatement, because his property is no longer worth what it was prior to us passing this article.

But the decision is yours, ladies and [48] gentlemen, and I believe Mr. William Towle is here, and I would like to recognize him, with the consent of this body, and have him speak on the article if I may.

MODERATOR: The motion is before the house that this gentleman be allowed to speak. Will all those — is there a second to that, please?

BODY: Second.

MODERATOR: Will all those in favor please say aye?

BODY: Aye.

MODERATOR: Contra minded? It is a vote. Thank you. Would he come forward please. Please identify yourself by name so that the reporter will have your name. Thank you.

MR. BILL TOWLE: Thank you, Mr. Moderator. Mr. Reid, ladies and gentlemen of the Town Meeting, thank you very much for the opportunity. My name is Bill Towle, I'm senior Vice-President of National Amusements, owners and operators of the Showcase Cinema at the intersection of Route One and Elm Street.

I'm most pleased to certainly hear, what I feel to be, a very sincere sense of fair play toward your business neighbor. It's most appreciated and most [49] welcome. I think what I would really like to speak to you about is an amplification of that fair play issue. So, if I may, just to give you a brief history and I'll try not to take a lot of your time. As again, I do appreciate just the opportunity of being able to address you.

On January 23rd we received a letter from the Board of Selectmen asking us to appear before them at a meeting on February 2nd to address issues of alleged problems with the late shows and security and so forth on the parking lot of the cinema following the late shows, which we hold on Friday and Saturday evenings. We've held the late shows at the cinema for fifteen years. This was the first time in the history of the operation of our cinema that we have been asked, either by the Selectmen, by any neighbors, or by the police department to ever come before them. We've never been approached or asked any consideration, any thoughts in mind of any problems with our late show operation. So, this was the first time.

Appendix A

On the morning of February 1st, just to kind of give a chronological perspective here, we read in the Dedham transcript that this article had been [50] proposed on the — I believe it was the 16th of January. Article 40 had been proposed to be placed on the town warrant by the Selectmen and, again, we received our notification of request to discuss the various problems that were alleged to have occurred at our cinema on January 23rd, fully a week later.

So, we did meet with the Selectmen, subsequently we met with the police chief and neighborhood representative, Robert Cedrone that meeting took place approximately one week after the meeting with the Selectmen.

We listened to the problems and we worked out some solutions with the chief of police and also with the neighbors. Those solutions were to change some of the police schedules that we currently were running at the cinema. We introduced, as Mr. Reid said, a police van at our expense, driven by a Dedham police officer to patrol the parking lot of the cinema as well as to patrol the residential areas, which would be Robin Wood Road, Elm Street, and also up as far as Washington Street, Route 1A where the bus stops for the M.B.T.A. as they felt that there was some problems with the young children waiting for the bus up on Washington [51] Street. So, we agreed to patrol, also, that area. That patrol is on duty on the weekends from, approximately, seven o'clock in the evening until the theatre is closed and the parking lot is completely emptied. In addition to that, we have police patrols on our parking lot as well as, Mr. Reid mentioned, we manually control the traffic signal at Route 1 and Elm Street on the weekends to allow the cinema patrons to exit the theatre faster and eliminate traffic problems on Elm Street.

In addition to that, we have a police officer posted at the corner by the Holiday Inn, which is entirely off of our property, but yet we place the police officer there to stop people from parking across Route 1 and then trying to come across the heavy traffic on Route 1 to the cinema. So, that policeman as well as patrolling our customers and making sure they don't park there, also watches over the patrons for other businesses such as Hillary's the Holiday Inn and watches over, also, the cars that are parked in the Dedham Nissan parking lot. We do this, again, at our expense, our sole expense.

In addition to that we have a police officer [52] posted every weekend on the General Motors parking lot across the street on Elm Street. Again, this was done at the request of neighbors who felt teenagers were hanging out in that lot during the late hours. So, we put a police officer there who blocks off the parking lot in the evenings and on the weekends to assure that no cinema patrons are parking in that lot.

In addition to that we have been working, at the request of the Selectmen, during that meeting on February 2nd, with the M.B.T.A. to attempt to get a bus stop changed, so that the cinema would become part of the bus stop routing for the bus running between Forest Hills station and Walpole center. We've had several meetings with the M.B.T.A. and we feel we're coming close to working that out. The bus stop area would be dedicated to the M.B.T.A. for their use by the cinema and we would be making any of the necessary changes and so forth to allow that stop to be used. This would not only be beneficial to the people trying to use the buses to go to the cinema, it would also be very beneficial to the people working on Elm Street where all of the new office buildings and so forth have been built down past the cinema, and also past where our [53] office building is.

So, we have effectively, I believe, from that respect, tried to address, sincerely address, at great expense, a lot of the problems that were presented to us by the Selectmen. In addition to that we have meeting with the neighborhood representatives. We've had five meeting with them. They have asked us to address problems, some of which have no bearing on the late show, but nonetheless we have tried to address those problems, work with our neighbors to solve general neighborhood problems. It's been mentioned, for example, that we have our people pick up litter on the front yards, along the curbing of Elm Street. Our police patrol vehicle that goes up Robin Wood Lane and Elm Street and on up to Washington. They have asked us to do something with the rear gate, which is used for an express exitway out to Route 1; to close that gate up over night and we have certainly consented to do that with permission of the town officials, since we have been requested a few years ago to keep that open over night. But we're certainly willing to close that.

We have addressed many other issues on our parking lot as well as the entrance to the cinema. [54] It's been requested that we try to move the entrance to the cinema further to the north to get it away from Robin Wood and up adjacent to the General Motors area. We have been working on plans to do that and we are in the process of proposing and getting plans and trying to get approvals from the town to make that move.

All in all, through all of the proposals that we have made to our neighbors, the requests that our neighbors have made of us, the requests that the Selectmen have made of us, we anticipate and have proposals to the effect of spending about $284,000.00 to help improve the traffic situation on Elm Street, to help improve the traffic flows into our cinema and out of our cinema. In addition to that we spend, approximately, $184,000.00

annually on police and private security details to address the various problems that the neighbors feel that they have and to address the problems the Selectmen have presented to us as well as to present security for our own patrons and for our own cinema operation.

We would like to ask that in deference to the fact that we have proposed and agreed with our neighbors to proceed to spend that kind of money to [55] help resolve the problems that we not now be hurt, both economically and competitively in our business by closing us down. We would like to ask that you consider postponing the implementation of Article 40. Give us a year, let us work with our neighbors, let us work with the town officials, let us work with the Dedham Police Department. If after a year we haven't done our job and you feel that we are not a good neighbor, that we aren't a good corporate citizen, reenact the Article. But at least give us an opportunity to show that we can work with you and we can live in peace and harmony and do our job and be a good citizen. Thank you.

MODERATOR: Thank you very much. Now, Mr. Reid.

MR. REID: I'll need your assistance, Mr. Moderator. I'm not sure what the exact format of this is to reopen this for consideration and vote. But I would like to somehow project that this Article be re-voted and indefinitely postponed. If in fact, national Amusements does not deliver, then next year we can reintroduce the motion. How would I go about —

MODERATOR: Mr. Maggioni, the appropriate [56] vote would be for indefinite postponement, would it not?

MR. MAGGIONI: I think other people want to speak on this.

MODERATOR: Yes, but we haven't go a motion before the house, so we really ought to put the motion, right?

MR. REID: In deference to fairness I'll set the motion —

MODERATOR: Just a moment.

MR. MAGGIONI: The original motion is before the house on reconsideration. Now, if he wants to offer a motion for indefinite postponement, that's his prerogative.

MR. REID: Which I do, but I would like to offer that and then have discussion by other members here who would like to speak.

MODERATOR: Mr. Reid has proposed indefinite postponement, is there a second to that?

BODY: Seconded.

MODERATOR: Thank you. Now, are there people that want to speak on the Article? This gentleman here, please.

[57] MR. CEDRONE: Thank you Mr. Moderator. My name is Bob Cedrone and I'm District Representative of District 6. I'm also the Chairman of the Poor Farm Committee. I don't think many people here remember the Poor Farm. To those who do and some that don't it used to be up where G.M. is. The farmhouse itself used to be where Allied Fabric is. That's right across the street from the cinema. Now, right behind G.M. is a neighborhood. It's Robin Wood Road and Elm Street. There's twenty-six houses in that neighborhood. The houses consist mainly of six middle aged adults, my age, and 80% of them are elderly.

Appendix A

We set up our committee on the request from the Selectmen to get together with the theater and try to come to terms with what was going on in the parking lot at night about security. We met down Chief Teeling's office and we got together on extra police details. We asked them to supply a van and they did and they cooperated with us on that. There are a few other items that we wanted to take care of and we went into meetings for about six to eight weeks and nothing was — just a lot of lip service.

In the old days before the cinema was there [58] and before G.M. was there that neighborhood had neighbors that were people, not businesses. People had the say on who was walking the streets in their neighborhood, not businesses. Now it's getting to the point where every time that neighborhood turns around there's more people coming out of the late show cutting through the neighborhood, cutting through the back yards. The elderly people still can't get used to that, even with the extra police protection. The van helps them out a lot. They've talked to me, they like to see the police presence and the extra police on duty are appreciated greatly.

But in that area of Dedham the businesses start about nine o'clock, so from nine o'clock in the morning until about ten, ten-thirty you can't pass on Elm Street. Then when they close up at three o'clock, from about three to six you can't get by on Elm Street. That happens all week long. Then you figure on the weekend when businesses are normally closed, the theater is open. So, during the day you don't have to worry about your kid running out on Elm Street on Saturday because the theater is not doing much business during the day. But then at night when it's dark it's [59] not your kid your worrying about anymore. At twelve o'clock they're showing movies, you're in bed. When most of you people are in bed, sleeping, you've got that serenity,

you can go to bed, you can sleep, there's no problem. The people in this neighborhood got to go to sleep. If they hear a noise outside, they're awake. They're sleeping on eggs out there.

There's been many phone calls many times in the past for the younger people in the neighborhood to go out and investigate things and we've done it. Because they're elderly, some of — they're all over sixty. Some of them are in their eighties.

Just recently National Amusement hired more detailed officers, supplied them with the van for the patrolling the neighborhood. This was greatly appreciated. The back gate was asked to be closed during the day and in the morning and to be opened at night when they were doing business, because the problem we have there is people coming out of the — from behind their parking lot using Elm Street, adding more traffic. Then they took us to — the police chief it started with. Then it went to the fire chief and now it's somewhere else in town government, I don't [60] know where it ended up, but the gate still isn't closed and you still have traffic coming through.

I think where we already voted on this article that we should keep it installed. Send a message back to Robin Wood Road, Elm Street that this town is going to start uniting against these businesses and let the town run their own streets again. Not the businesses. I think that would be a great message to bring back to Robin Wood Road. Thank you.

MODERATOR: Mr. Hoyle, please. You're not a Selectmen and you won't be a Representative of this town if you don't keep quiet (indicating to floor).

MR. HOYLE: Despite Mr. Reid's eloquence, he certainly

doesn't live in the neighborhood. He has not come out of that theater, started up his vehicle and found all four wheels drop off the car. He's not had a fifteen or sixteen year old youngster up in that particular area on an extremely cold night, two of them, stripped of their jackets. Fortunately, our police department found these nice little out-of-towners down at the Lechmere lot and these individuals were apprehended. There are numerous instances of acts that can only be attributed to an undesirable element [61] that's attracted by General Cinema activity. We've had several meetings on this particular issue with the proprietors of that entity. One of the compromises that I offered as a member of the Board of Selectmen was that they would abstain from going forward with their intention of adding two more theaters. They've got ten up there now. They want to add another two, making it twelve. To see whether or not the measures that they proposed implementing really bring on a desirable result for the neighbors, they did not buy the compromise, yet they want you to abstain from action on this particular matter deferred for another year. The Board of Selectmen have heard neighbors on many, many, occasions speak of what they have to confront with. I think that if Mr. Reid was up in that particular area he'd be singing another tune.

MODERATOR: Mr. Brown. Mr. Brown wants to speak.

MR. JAMES BROWN: My name is James Brown, 418 Whiting Avenue, Dedham, I'm a Town Representative. I also worked for Norwood Security who does the security work for the cinema. I was there for two years and I was stationed outside. There was not as many problems [62] as there is now. I don't know who's up there on security, but they took me out of there and I would not go back there if they begged me. So, let them live with the problem they have. If they can't afford to hire security

and put them where they should be, then they shouldn't be there. Thank you.

MODERATOR: Mr. Johnson, please.

MR. FREDERICK JOHNSON: Frederick Johnson, District Six. What we have here is a very touchy situation, ladies and gentlemen. I'm of the firm belief we should let the people of the theater, Mr. Towle and those people — and let me emphasize, they are professional people up there. They have made a decent effort. They are not out to just make a buck. They are in business to make a profit, but I mean they are concerned about the neighbors. But I think this is something the neighborhood and Mr. Towle and the theater and — have to work out themselves.

The neighborhood people voted in the Selectmen's chambers two weeks ago, or whatever, to implement this article. There's nothing that says that if Mr. Towle and the people from National Amusements make an agreement with the neighbors that satisfies [63] them they can't tell us to rescind this vote next year. I think it's a matter of business in this town against the residents. That's what it boils down to. Twenty-six tax paying dwellings against one business tax paying dwelling. Believe me, National Amusement pays their taxes. We're not out to — to say that they don't. They've done some good improvements up there, but I think this is the chance to give the neighbors the ace.

We implement this article and then we let Mr. Towle and National Amusements negotiate with the neighborhood this year. If they can make satisfactory repairs, or however you want to word it, to make everyone mutually happy, the neighborhood committee can let the Selectmen know next year they they want this rescinded. That they've come to an agreement, that they're

willing to let these people stay open. That they're willing to let them conduct their business, but they're going to be guaranteed what they want.

We have to back up the residents of this town before we back up the businesses. I mean, every time we come up to a commercial development article we're against business. I'm not totally against business in [64] this town. They pay their taxes, but I think we've got to give the neighborhood the edge. That's the way to vote on this article.

As far as closing them at twelve-thirty, one o'clock, two o'clock, maybe if they're willing to do some other things the neighborhood might come back and say, let's close them at two. These people are stuck up there. These are the people that are stuck between the highway, the theater, and pretty soon N.D.A. Nobody wants to say it, but that's the bottom line. A little peace and quiet between twelve-thirty and six in the morning isn't too much to ask. If they're willing to perhaps settle for some other improvements in the area and let the theater stay open, let them negotiate. But let's let them negotiate from a position of strength. I ask you to hold this motion the way it's passed. Let a year go by. I know it's going to hurt the business of the theater, but it's going to give the neighborhood a little bit of an edge to get what they need up there. This is my district. These people, they're going to be hurting up there. Let's give them a break. Thank you.

MODERATOR: Mr. Chaffee, please.

[65] MR. CHAFFEE: Thank you, Mr. Moderator. Not my intention to keep the discussion going, but in answer to Mr. Brown's question, the security guards were removed by request of the Board of Selectmen and regular Dedham Police details were hired by National Amusement.

The second statement I'd like to make, you can sit in any one of a number of places in town of Dedham and drink to your heart's content until 1:00 a.m., but you can't watch a movie after midnight.

MODERATOR: Thank you, Mr. Chaffee. Mrs. Kehoe, please.

MRS. KEHOE: Thank you, Mr. Moderator. I hope that indefinite postponement does not prevail. I think when we look at this particular article, we're looking at the health of the town, the welfare of the residents of the town. In recent years and in recent weeks, as a matter of fact just two weeks ago this evening, this Town Meeting body saw fit to hang tough on certain re-zoning. Why did you do it? You did it to protect the town.

This is a similar issue. We have had a number of problems up there which have called for [66] special assistance from our police department. Let there be no misunderstanding — and I'm pulling from my memory, because I don't have the statistics with me this evening, but I think there was some forty-four odd calls to the department in a matter of, approximately, six weeks. Mr. Hoyle named a few of the incidents.

In addition, because of the attraction at that corner, we have had fences that have been put up by residents destroyed, graffiti written all over them, rocks thrown through windows of residents in the area. Very, very serious, very threatening offenses.

We feel that fair play is in order. If we want to talk about fair play I think we should consider the residents. I have with me a petition signed by the residents of Robin Wood Road and Elm

Street, seeking consideration. Not allowing National Amusements to conduct their business after 12:00 a.m.. The greatest problem that has faced us are the late shows on the weekends when the theater exits at two and three o'clock in the morning. I think that this has become more than the neighborhood can handle. We really have felt that we had to halt the practice. Probably a month ago we met with the residents and the vice [67] president was there. The vice president told us of all the things that had been done to satisfy the neighborhood and the town and all the things that they would try to do in the future. I'm sure that they will make every effort to keep their word. However, I would suggest to you, as Fred Johnson suggested, let's go ahead and keep what we voted in place. Keep what we voted two weeks ago in place and if National Amusements satisfies the needs of the residents in the town then next year I will come back here and I will ask that we rescind the action that we took two weeks ago.

You know, I remember standing before this body some six, seven, eight years ago and we talked about precinct lines and the need for precinct lines. Yet when it comes to an issue such as this, which may effect a neighborhood in particular, but a town in general, I think it's important that we forget those precinct lines and whether a person lives in one or nine or six or four, we've all got to stand together and support the neighborhood that is crying out for our help. Believe me when I tell you that this neighborhood is crying out for our help. If they weren't the Board of Selectmen would not be here this [68] evening united in their stand. So, we ask you, please, do not vote to indefinitely postpone this article. It's essential that we keep our original vote of two weeks ago in place. Put yourself — place yourself in a home on Robin Wood Road or Elm Street. Can you imagine what you would be putting up with? Don't you believe that truly you would have put your name on this petition? Don't you believe that

you would have come before the Board of Selectmen imploring help? Those people did and I think it's up to this Town Meeting body to understand the position that those residents find themselves in and to vote not to indefinitely postpone this article.

If National Amusements goes through and satisfies the residents the Board of Selectmen will be back next year and relieve National Amusements of the twelve-thirty closing. Thank you very much.

MODERATOR: Mr. Civatarese.

MR. CIVATARESE: Nick Civatarese. We do have a district three, and that's where I'm from. Mrs. Kehoe forgot to mention it, we'd like to stand behind these people, too. She says, "Please forgive me". I do.

[69] I was at the Selectmen's meeting when that young fellow came in and he threw his pitch. I've got nothing against him, I've got nothing against the show. He's got an awful lot of shows there. He gave his reasons. At first they wanted to close at twelve o'clock. He said twelve o'clock is too early. They said why? I don't know this much about it, but I'm going to give you an idea of what he said. Some of their films go until five past, ten past, quarter past twelve. He said if you deprive me of this, he said, what time do you want me to start the shows, I'll have to start a little too early.

The neighbors were there and they said, well, that's sounds fair. How about if we suggest twelve thirty. He said twelve thirty sounds pretty good. He says, that gives me a chance to finish all my films, and he says, today with the competition the way it is we have to get so many films a week, if we don't we don't get the

choice films. So the neighbors said, okay, let's buy the twelve-thirty.

Now as far as I'm concerned, there's nobody here killing this man. He's got enough people coming and going from there. I think he should make a pretty [70] good living by closing at twelve-thirty. I don't think we're asking too much. I know I wouldn't want the show every night coming out of my place at two, three o'clock in the morning. I think twelve-thirty is late enough.

Why don't we give it a shot? Then we'll come back at a later date and we'll take some more on it. What I'd like to ask you, please, let's support the people in that neighborhood as we've supported them in other neighborhoods and let's give them a vote of confidence. Let's stick with the neighbors. Thank you.

UNIDENTIFIED SPEAKER: I thought we voted a midnight closing?

BODY: No!

MODERATOR: Now, the question before the house is a vote on indefinite postponement. That requires a simple majority vote. Will all those in favor of indefinite postponement of this article kindly say aye?

BODY: Aye.

MODERATOR: Those opposed?

BODY: No!

Appendix A

[71] MODERATOR: It is not a vote. Now, we have to take a vote to — what?

MR. MAGGIONI: The original article has to be re-voted.

MODERATOR: Yes, we have to re-vote the original article. That — the vote comes — and the vote comes on the twelve-thirty closing, that the article be so voted in that manner.

Will all those in favor please say aye?

BODY: Aye.

MODERATOR: Contra minded? It is a vote. Thank you very much. That was good debate.

Now, let's move to — Yes? Mr. Boylan.

MR. GEORGE BOYLAN: I'm reluctant to do this, but obviously, we're not going to finish Town Meeting by ten-thirty this evening. The Town Counsel indicted this would be an appropriate time to move for reconsideration. What I'd like to do is move for reconsideration of Article 12, and hopefully, with a second, I'd like to explain why the motion for reconsideration.

MODERATOR: Is there a second? There is a second. Would you tell us why you want reconsideration

* * *

Appendix A

A TRUE COPY ATTEST:
s/ Margaret M. McGowan
MARGARET M. McGOWAN
TOWN CLERK

DEDHAM FINANCE COMMITTEE

TOWN OF DEDHAM

Special Town Meeting

Dedham Finance Committee

MONDAY, NOVEMBER 6, 1989

7:00 P.M.

DEDHAM HIGH SCHOOL AUDITORIUM

* * *

[Commencing at Page 48] THE MODERATOR: No.

MR. REID: Okay.

THE MODERATOR: We'll vote the original motion.

MR. REID: Okay.

THE AUDIENCE: Question.

THE MODERATOR: Is there further discussion? There

being none, the vote comes on the original motion of the Finance Committee that it be so voted.

Will all those in favor, please say aye.

(Aye)

THE MODERATOR: Contrary minded?

(No)

THE MODERATOR: It is a vote, thank you . Article Four, is there discussion on Article Four? There is a gentleman here, I believe, from National Amusements, Mr. Towey, he has requested that he be permitted to speak. He is not a District Representative and, in fact, I believe he is not a resident of the Town of Dedham, is that correct?

MR. TOWEY: That is correct.

THE MODERATOR: It requires a vote of the Town Meeting.

Will all those in favor of having Mr. Towey [49] speak, kindly say aye.

(Aye)

THE MODERATOR: Those opposed? Go ahead, and please identify yourself. Thank you.

MR. TOWEY: Thank you, Mr. Moderator, and ladies and gentlemen of the Town Meeting, thank you. My name is William

Appendix A

Towey. I am the Senior Vice President of National Amusements, Incorporated, with offices here in Dedham, and we own and operate the Showcase Cinema which, basically, this Article refers to.

I would like to state that our company is in opposition to this Article, and state some of the reasons why we feel it should not be passed and voted upon. One of those certainly is it will create a severe economic impact to the operation of our business, which has been in Dedham for a good number of years now; in fact, I think we opened the cinema in 1974, '73, somewhere along in there.

We have always worked out any problems that our neighbors in the Town of Dedham felt that we had, and I think we've done a pretty good job of working out any of those situations that have developed with the [50] operation of our business in Dedham. We've always operated late shows on the Friday and Saturday evenings since we have been operating this cinema, and had no objection to this until just recently. The Bylaw discriminates against us, and that's notwithstanding the changes that were made in the previous Bylaw, which was ruled, I believe, the word to be "unconstitutional" by the Attorney General's Office. The purpose, however, of the new Bylaw, which you are voting on tonight, still is the same, and that is to single out the Showcase Cinema and to curtail its operational hours.

We have discussed on many occasions and agreed to implement alternative measures as a way of dealing with all of the concerns, I think every concern, that the residents and the City have had with the operation of our cinema in Dedham. In view of the history of our operation and the record of our

operation, and I think that can be attested to by the Police Department, and frankly, as well by the selectmen, that I feel this Article is an unfair restriction on the operation of our business.

I might refer just a little bit, if I may, to [51] the prior attempt at passing such a restriction. The fact that it was disproved by the Attorney General's Office, while I do disclaim any legal knowledge or understanding of the legalities of the matter not being an attorney, I might say that the net effect of this law is to do basically what was proposed by the prior law which was ruled illegal, and I'm certain you are concerned, and I know I am concerned, as to the legality of this Article as well.

I requested a well respected Massachusetts' law firm to send me an opinion of this newest Article, and I have that opinion with me; the firm is Glaston and Snow, they have concluded that the Bylaw is also unlawful and improper. And if I may just take one minute I'll read some excerpts from that. I'd be glad to make this statement from Glaston and Snow available to the Board of Selectmen if they so desire. But the basic of the content of this letter, which is addressed to me, "It is our view that Article Four is subject to Constitutional attack, since at least some of the activities covered by the proposed Bylaw are protected by the First Amendment to the United States Constitution," and they go on to quote some various [52] situations which have come up before the courts, and the regulations and so forth which I won't bore you with on that. It goes on further to say Article Four is likely to be judged impermissibly vague, and further the broad scope of Article Four is unlikely to pass muster under the Supreme Courts' stringent time, place, and manner restrictions. Apart from what the attorneys say and what the Attorney General and the Courts ultimately will decide, I feel, again being repetitive, that the law is unfair.

Appendix A

We all know the real purpose of this law, and that is to force the Showcase Cinema to close early on Friday and Saturday nights. The Bylaw really is designed to have an impact only, only, upon our operation in Dedham. And, ironically, although the laws in the Town of Dedham say that the bars must close at one a.m., we all know, and the laws also read that the patrons do not have to leave the bars until two a.m., yet for some reason we do not want people to sit in a movie after one a.m., maybe have some popcorn, but it's okay if they finish their drinks in the bars. I don't quite understand that logic, it's clearly discriminatory.

[53] It's not our company's desire to take issue with the Town on this law, but in view of the potential economic impact, and certainly I've sat here through the meeting tonight and I've heard of the severe economic problems, not only the Town of Dedham, I happen to live in the Town of Norwood right next door and I hear the same problems in my own town, and we're talking here of instituting an Article that would have severe economic impact on the business in which I work, on a business which happens to be in the Town of Dedham, I think a business that is well respected in the Town of Dedham, and yet we're talking severe economic impact, not only to our company, but possibly and probably to the Town of Dedham as well.

It's not, as I say, the intention of our company to go to war, so to speak, with the Town of Dedham, but we also do not want to have severe economic impact on our business, and, frankly, I would rather think we wouldn't cause severe economic impact on the Town of Dedham as well. But, at any rate, I'm certain that whatever would happen it would be a severe and unwelcome expense on both the part of our company and upon the Town. And I cannot help but feel, and I have [54] made this statement to our neighbors during many, many meetings with them, why pay the

lawyers to deal with our problems if we as neighbors can work out those problems to the satisfaction of all.

I think we have solved a lot of our problems. Just to point out a few things, we have policemen stationed at the corner of Robinwood and Elm. We have signal controls manually operated by police officers hired by Showcase Cinema at the intersection of Route 1 and Elm Street. We have police patrol the neighborhoods. It's probably the best protected neighborhood in the town of Dedham, or maybe anywhere in the suburbs of Boston, at Showcase Cinema's expense, I might add.

We have special screen announcements asking our patrons to use rear exit ways to get them away from using the intersection of Elm Street in Dedham; again at the request of the Town of Dedham we complied and we've been doing this for years. We have our own personnel picking up trash that's left by, not just our patrons, but by other people using Elm Street, and they pick up the trash along the properties of our residential neighbors. We have meetings, as I had [55] mentioned, on an ongoing basis with the neighborhood committee.

And I just want to add as a finale, we're spending $250,000.00 annually for police who work at our cinema, work on our parking lot, and work on the neighborhood areas, including the parking lot by Hillary's, including the intersection of Robinwood and Elm Street, the intersections of Route 1 and Elm Street, and a patrol van, as well, that patrols the neighborhoods on Friday and Saturday nights in and surrounding the Showcase Cinema. I doubt — No, I know, there are no other businesses in the Town of Dedham that cooperate with the citizens of the Town of Dedham the way our cinema and our company does. I respectfully ask that you vote to reject this Article. Thank you.

THE MODERATOR: Thank you. Mrs. Keogh, please.

MRS. KEOGH: Thank you, Mr. Moderator, Finance Committee Members, Town Meeting Members and interested residents of our Town of Dedham, it is the intention of your Board of Selectmen through this particular Article to achieve a uniform closing for all establishments and/or businesses which are licensed by the Board of Selectmen; that is a closing between one a.m. and six [56] a.m. We really feel that those five hours should serve as respite, if you will, for the residents of our town; sleepy time in common language. And we hope that you will support the position of the Board of Selectmen which is, in fact, the recommendation of the Finance Committee. Thank you very much.

THE MODERATOR: Yes, Mr. Johnson.

MR. JOHNSON: Ladies and gentlemen of the Town Meeting, this is my District, District Six. I don't really feel this Article is very discriminatory. To be quite honest with you, if somewhere here can tell me where between one and six you can buy a gallon of milk, loaf of bread in the Town of Dedham, I really want to know.

What we have here is a basic closing from one to six, and to leave the theatre open when we can't open Curtis' Market or Nancy's — Well, Nancy's not there, but any of these other stores, would be reverse discrimination on those people in that neighborhood. It's a very basic issue here, the Town's closed from one to six or it's not closed from one to six. We voted to close earlier, maybe perhaps that the wording was wrong. I would hope that everyone would support one to six for [57] everything and we'll take our shot with the Attorney General. Thank you.

Appendix A

THE MODERATOR: Thank you, Mr. Johnson. Anybody else like to speak on the Article? There being no further discussion the question now comes on the original motion of the Finance Committee that it be so voted.

Will all those in favor, please say aye.

(Aye)

THE MODERATOR: Those opposed?

(No)

THE MODERATOR: It is a vote.

Now, ladies and gentlemen, we've come to the end of our business and there is a motion before the House by Mrs. McGowan that this Special Town Meeting is hereby dissolved, is there a second to that motion, please?

(Seconded)

THE MODERATOR: All those in favor, please say aye.

(Aye)

THE MODERATOR: Contrary minded? It is a vote. Thank you. Thank you for your time and patience.

*

(Whereupon, the Town Meeting concluded at 9:05 p.m.)

Appendix A

[58] CERTIFICATE

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

I, KAREN MC ALLISTER, a Notary Public in and for the Commonwealth of Massachusetts, do hereby certify:

That the testimony hereinbefore set forth, was recorded by me and transcribed by me; and that such is a record of the testimony given.

IN WITNESS WHEREOF, I hereunto set my hand and notarial seal this 1st day of December, 1989.

s/ Karen McAllister
Karen McAllister
Notary Public

APPENDIX B — EXCERPT FROM THE RECORD: FEBRUARY 5, 1993 LETTER OF PETITIONER'S COUNSEL

FINNEGAN AND STANZLER, P.C.
ATTORNEYS AT LAW
THE CLAFLIN BUILDING
TWENTY BEACON STREET
BOSTON, MASSACHUSETTS 02108
(617) 523-2500

February 5, 1993

Joyce Frank, Esq.
Kopelman and Paige, P.C.
101 Arch St.
Boston, MA 02110-1137

Re: National Amusements, Inc. v. Town of Dedham
U.S. District Court No. 90-104724

Dear Joyce:

Pursuant to the Court's December 8, 1992, Scheduling Order, I am forwarding to you National Amusement's reply to the Town's proposed stipulations of fact.

I want you to know that since the Town of Dedham decided to push this case forward a few months ago, I have done some rather serious investigation as to the Town's motives in passing the ordinance and its impact upon Showcase Cinemas' patrons. I am deeply disturbed to find that the Town apparently passed the ordinance for purposes of infringing Showcase Cinemas' right to exhibit films to black patrons.

there may well be extensive press coverage and public scrutiny embarrassing to Town officials.

Cordially,

s/ Theodore E. Dinsmoor
Theodore E. Dinsmoor

TED/jmw 4-36
Enc.

APPENDIX C — EXCERPT FROM THE RECORD: BYLAWS RESTRICTING LATE NIGHT COMMERCIAL ACTIVITY

TOWN OF DEDHAM
COMMONWEALTH OF MASSACHUSETTS

MARGARET M. MCGOWAN
ASSISTANT TOWN CLERK

JOHN T. CAREY
TOWN CLERK

TEL. 326-1638

May 1976

ANNUAL TOWN MEETING Third night April 26, 1976

ARTICLE TWENTY-EIGHT: By the Selectmen: To see if the Town will vote to amend Chapter XIII (Police Regulations), of the Revised By-Laws of the Town of Dedham by adding a new section at the end thereof as follows:

"Section 42. No person shall sell at retail between the hours of 12 midnight and 6:00 A. M. any food.

The term food as used in this by-law shall include any article or commodity however, stored or packaged, intended for human consumption, and shall include alcoholic beverages to be consumed off the premises at which they are sold, unless any other law or permit or license granted to the seller of such beverages shall otherwise provide.

This by-law shall not apply to the sale of food or alcoholic beverages to be consumed on the premises at which they are sold or to be consumed off the premises on which they are sold when such sale is by a licensed common victualer primarily engaged in the sale of food to be consumed on such premises.

Appendix C

Persons found guilty of violating this section shall pay a fine of $50. For purposes of this by-law each separate sale shall be deemed a separate offense. In the event of sale of several items or articles at one time to one customer, only one sale shall be deemed to have taken place.

Section 42A. No store or place of business engaged in the retail sale of food shall be open for the transaction of retail business between the hours of 12 midnight and 6:00 AM.

This by-law shall not apply to the sale of food or alcoholic beverages to be consumed on the premises at which they are sold or to be consumed off the premises on which they are sold when such sale is by a licensed common victualer primarily engaged in the sale of food to be consumed on such premises.

This by-law shall not be deemed to repeal or replace Section 42 of Chapter XIII of the Revised By-Laws, and each by-law shall be deemed separately enforceable. An adjudication that Section 42 or Section 42A of Chapter XIII of the Revised By-Laws or any part of either such section is unconstitutional or invalid shall not operate to affect the constitutionality or validity of the other by-law or any part thereof which can be given effect without the provision deemed unconstitutional or invalid.

Violators of this Section shall be subject to a fine of $50. for each violation. In case of continuing violation, every calendar day upon which a store shall remain open shall be deemed a separate offense."

It was so VOTED. (Yes - 130, No - 81)

Appendix C

A true copy attest:

s/ Margaret M. McGowan
Margaret M. McGowan
Town Clerk

Appendix C

TOWN OF DEDHAM
COMMONWEALTH OF MASSACHUSETTS

TEL. 326-1638

MARGARET M. McGOWAN
ASSISTANT TOWN CLERK

JOHN T. CAREY
TOWN CLERK

SPECIAL TOWN MEETING — April 9, 1979

ARTICLE EIGHT: By the Board of Selectmen. To see if the Town will vote to amend Paragraph one (1) of Section 42A of Chapter XIII of the Revised By-Laws of the Town of Dedham as follows:

"No store or place of business engaged in the retail sale of any commodity shall be open for the transaction of retail business between the hours of 12 midnight and 6:00 A. M."

On motion of the Board of Selectmen, it was VOTED: That it be so voted with the addition of the phrase "except fuel products" after the word "commodity".

A true copy attest:

s/ Margaret M. McGowan
Margaret M. McGowan
Town Clerk

Appendix C

TOWN OF DEDHAM
COMMONWEALTH OF MASSACHUSETTS

TEL. 326-1638

MARGARET M. McGOWAN
TOWN CLERK

SPECIAL TOWN MEETING, NOVEMBER 6, 1989

ARTICLE 4: By the Board of Selectmen:

To see if the Town will vote to amend Chapter XIII of the Revised By-Laws of the Town of Dedham, entitled, "Police Regulations" by adding a new section at the end thereof, as follows:

> Section 57.
> Unless otherwise restricted, no holder of a license issued by the Town of Dedham, pursuant to Massachuetts General Laws, Chapter 140, Sections 177A, 181 and 183A, shall permit any activity licensed thereunder to be conducted between the hours of 1:00 A.M. and 6:00 A.M.

It was so VOTED. UNANIMOUS VOTE

A true copy attest:

s/ Margaret M. McGowan
Margaret M. McGowan
Town Clerk

Appendix C

TOWN OF DEDHAM
COMMONWEALTH OF MASSACHUSETTS

TEL. 326-1638

MARGARET M. McGOWAN
ASSISTANT TOWN CLERK

JOHN T. CAREY
TOWN CLERK

May 16, 1980

ANNUAL TOWN MEETING 3rd night May 12, 1980

ARTICLE THIRTY-FIVE: By the Sign By-Law Committee. To see if the Town will vote to amend the Revised By-Laws by inserting the following new chapter to be numbered in consecutive order following the last numbered chapter:

Chapter — Sign Code.

1. Definitions

SIGN shall mean any device designed to inform or attract the attention of persons not on the premises on which the device is located. Any exterior building surfaces which are internally illuminated or decorated with gaseous tube or other lights are considered signs. The following, however, shall not be considered signs within the context of this bylaw:

a. flags and insignia of any government except when displayed in connection with commercial promotion;

b. legal notices, or informational devices erected or required by public agencies;

c. standard gasoline pumps bearing thereon in usual size and form the name, type, and price of gasoline;

d. integral decorative or architectural features of buildings, except letters, trademarks, moving parts, or parts internally illuminated or decorated with gaseous tube or other lights;

e. on-premise devices guiding and directing traffic and parking, not exceeding two (2) square feet in area, and bearing no advertising matter;

f. on awnings or similar devices, lettering not exceeding 3" in height, or symbols not exceeding four square feet in area.

SIGN AREA shall mean the area of the smallest horizontally or vertically oriented rectangle which could enclose all the display area of the sign, together with any backing different in color or material from the finish material of the building face, without deduction for open space or other irregularities. Structural members not bearing advertising matter shall not be included unless internally or decoratively lighted. Only one side of flat, back-to-back signs need be included in calculating sign area.

TEMPORARY shall apply to a period of thirty (30) days or to the period to which the information on the sign is relevant, whichever is less.

2. General Regulations

a. Permits. No sign shall be erected, enlarged, or

structurally altered without a sign permit issued by the Building Inspector, unless specifically exempted from this requirement by Section 1. Permits shall only be issued for signs in conformance with this Bylaw. Permit applications shall be accompanied by two prints of scale drawings of the sign, supporting structure/method of attachment, and location. A copy of any relevant Special Permit shall also accompany the application.

b. Maintenance. All signs shall be maintained in a safe and neat condition to the satisfaction of the Building Inspector.

c. Nonconformancy. Any nonconforming sign legally erected prior to the adoption of this provision, or any amendment hereto, may be continued and maintained, except that all off-premises signs must be in conformance with Section 2.e (below) by June 1, 1985. Any sign rendered nonconforming through change or termination of activities on the premises shall be removed within thirty days by order of the Building Inspector. No existing sign shall be enlarged, reworded, redesigned, or altered in any way unless it conforms with the provisions contained herein. Any sign which has been destroyed or damaged to the extent that the cost of repair or restoration will exceed one-third of the replacement value as of the date of destruction shall not be repaired, rebuilt, restored, or altered unless in conformity with this bylaw.

d. Prohibitions

(1) No sign shall be lighted, except by a steady, stationary light, shielded and directed solely at or internal to the sign.

(2) No illumination shall be permitted which casts

glare onto any residential premises or onto any portion of a way so as to create a traffic hazard.

(3) No sign shall be illuminated in any district beyond the normal business hours of the establishment to which it pertains.

(4) No sign having red or green lights shall be erected within sight of a traffic signal unless approved as non-hazardous by the Chief of Police.

(5) No illuminated sign shall hereafter be constructed or installed where the illumination shall be in motion or shall otherwise race or flash, blink, rotate, oscillate, or increase or decrease in intensity of illumination, nor shall sign be constructed so as to present the visual effect of movement or oscillation, vibration or change in illumination. This prohibition against moving or blinking lights shall not apply to illuminated hands or numerals of clocks and thermometers or signs erected to protect the safety of the public against dangerous conditions.

(6) No pennants, streamers, advertising flags, spinners, or similar devices shall be permitted, except as allowed by the Board of Selectmen.

(7) No signs shall be attached to motor vehicles, trailers, or other movable objects regularly or recurrently located for fixed display, whether on public or private property.

(8) Corner visibility shall not be obstructed.

e. Off-Premises Signs. Only signs pertaining exclusively to the premises on which they are located or to products, accommodations, services, or activities on the premises shall be allowed, except that an off-premises directional sign, designating the route to an establishment not on the street to which the sign is oriented, may be erected and maintained within the public right-of-way at any intersection if authorized by the Selectmen, or on private property if granted a Special Permit by the Zoning Board of Appeals. Such signs shall be authorized only upon the authorizing agency's determination that such sign will promote the public interest, will not endanger the public safety, and will be of such size, location, and design as will not be detrimental to the neighborhood. At locations where directions to more than one establishment are to be provided, all such directional information shall be incorporated into a single structure. All such directional signs shall be unlighted and each shall be not over four square feet in area.

f. Temporary Signs. Temporary signs shall be allowed as provided below, and provided that they comply with the following:

(1) Unless otherwise specified in this bylaw, temporary signs must comply with all applicable requirements for permanent signs, including issuance of a sign permit.

(2) Temporary signs not meeting requirements for permanent signs may, if allowed below, advertise sales, special events, or changes in the nature of an operation, but shall not otherwise be used to

advertise a continuing or regularly recurring business operation, and shall be removed promptly when the information they display is out of date or no longer relevant.

3. Permitted Signs

a. Residence Districts. The following signs are allowed in Residence Districts as well as in all other districts. In a Residence District, no part of any sign shall be more than fifteen (15) feet above ground level.

(1) One sign, either attached or free-standing, indicating only the name of the owner or occupant, street number, and permitted uses or occupations engaged in thereon, not to exceed two square feet in area. Requires no sign permit.

(2) One sign oriented to each street on which the premises have access, either attached or freestanding, pertaining to an apartment development, such sign not to exceed ten square feet in area.

(3) An off-premises directional sign as provided at Section 2.e.

(4) Temporary signs of not more than twelve square feet in area, erected for a charitable or religious cause, requires no sign permit if removed within thirty (30) days of erection.

(5) One temporary unlighted real estate sign advertising the sale, rental, or lease of the premises or subdivision on which it is erected, such sign not to be larger than six (6) square feet, requires no sign permit.

(6) One temporary unlighted sign not larger than twenty-five (25) square feet indicating the name and address of the parties involved in construction on the premises, requires no sign permit. Said sign to be removed immediately upon completion of the project.

b. Shopping Centers and Multi-Use Buildings.

(1) Signs as permitted in Residence Districts, except that temporary real estate signs may be as large as ten square feet.

(2) Signs attached to a building or its canopy, parallel with the facade, and not projecting above the roof line, advertising the name of a firm, or goods or services available on the premises, provided that the total area of all signs erected on any wall by any occupant may not exceed 20% of the portion of that wall area assigned to that occupant. In no case shall any occupant's signs total more than 200 square feet facing any single street.

(3) For any retailing complex comprising three or more enterprises on a single lot and 50,000 sq. ft. floor area or more, one free-standing sign for each street on which the development fronts,

containing the name or other identification of the area occupied by the complex. Each sign shall be no larger than one hundred (100) square feet. Such sign shall not be located within five feet of any property line, or within twenty-five feet of the line of any public way, and no part of the sign shall be more than twenty-five (25) feet above ground level.

(4) Temporary unlighted signs inside windows, occupying not more than 30% of the area of the window, requires no sign permit.

c. Business Districts, exclusive of Shopping Centers and Multi-use Buildings.

(1) Signs as permitted in Residence Districts, except that temporary real estate signs may be as large as twenty-five (25) square feet.

(2) Signs attached flat against the wall or fixed canopy of a building, advertising the name of a firm, or goods or services available on the premises, provided that the total area of all signs on any side of a building may not exceed twenty (20%) percent of the area of the side of the building and in no case more than one hundred (100) square feet. Small individual signs not exceeding two square feet in area, on windows and identifying the occupants therein, shall be excluded from the above limitations.

(3) Signs projecting from a building over a public right-of-way shall not be permitted.

(4) Temporary unlighted signs inside windows, occupying not more than 30% of the area of the window, requires no sign permit.

d. Limited Manufacturing and Limited Manufacturing B Districts.

(1) Signs as permitted in Residence Districts, except that temporary real estate signs may be as large as twenty-five (25) square feet.

(2) Signs attached flat against the wall or canopy of a building, or projecting not more than six (6) feet above such wall, advertising the name of the firm or goods or services available or produced on the premises; provided that the total area of all such signs does not exceed twenty (20) percent of the area of the side of the building to which they are attached or two hundred (200) square feet, whichever is the larger.

(3) One free-standing sign, containing the name or other identification of the use on the property, for each street on which the property fronts, each sign limited to an area of one hundred (100) square feet. Such sign shall not be located closer than five (5) feet to any property line or the line of any way, and no part of any such sign shall be more than twenty-five (25) feet above ground.

(4) In LM and LMB only, temporary unlighted signs inside windows, occupying not more than 30% of the area of the window, requires no sign permit.

Appendix C

4. Billboards

No permit for the erection of new billboards shall be granted. All existing billboards shall be removed upon expiration of their respective special permits.

5. Appeals Process

Any of the above restrictions and regulations may, upon satisfactory proof that such waiver will not substantially derogate from the public good, be waived by a 4/5ths vote of the Zoning Board of Appeals, with the exception of: sign area, setback from public ways, and projecting signs overhanging public ways.

6. Administration and Enforcement

The Inspector of Buildings shall execute the provisions of this by-law, except where otherwise provided, and in so doing shall have the same powers as are provided for the execution of the State Building Code.

It shall be the duty of the Inspector of Buildings to enforce this by-law, and for this purpose he may make criminal complaints or apply for injunctions to any court of competent jurisdiction.

VOTED: That the above amendment be adopted subject to the addition of the following:

following section 2.d (8)

(9) Political Signs for any national, state or town election will be allowed for a period of only thirty

(30) days prior to the election and must be removed within seventy-two (72) hours after the election day.

following section 3.1 (6)

(7) Temporary, unlighted signs advocating the election, promotion, or defeat of a candidate for political or organizational office shall require no sign permit, provided that no such sign shall exceed nine square feet in area.

On motion of Mr. Poirier, the following amendment was VOTED:

following section 3.a (7)

(8) Temporary, unlighted signs expressing personal beliefs and opinions as provided for by Article I of the United States Constitution "Freedom of Speech", shall require no permit, provided that no such sign shall exceed nine square feet in area.

(3)

No. 94-1630

Supreme Court, U.S.
FILED
MAY 22 1995

In The

Supreme Court of the United States

October Term, 1994

NATIONAL AMUSEMENTS, INC.,

Petitioner,

vs.

TOWN OF DEDHAM,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Argument:

Disputes of facts exist as to each of the evidientiary elements alleged to support Dedham's ban on midnight movies, as well as its motive for banning the midnight movies. 1

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Acorn Investments, Inc. v. Seattle, 887 F.2d 219 (9th Cir. 1989) 4

Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah, __ U.S. __, 113 S. Ct. 2217 (1993) 8

Edenfield v. Fane, __ U.S. __, 113 S. Ct. 1792 (1993) 1, 7

Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) 2

Krueger v. Pensacola, 759 F.2d 851 (11th Cir. 1985) 4

Northend Cinema Inc. v. Seattle, 585 P.2d 1153 (Wash. 1978), *cert. denied*, 441 U.S. 946 (1979) 9

Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979) 8

Contents

Page

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) ... 2, 8, 9

Rubin v. Coors Brewing Company, __ U.S. __, 115 S. Ct. 1585 (1995) 1, 5, 7

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) 1, 2

Turner Broadcasting Systems, Inc. v. F.C.C., __ U.S. __, 114 S. Ct. 2445 (1994) 1, 7

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 2, 4

United States Constitution Cited:

First Amendment 1, 2, 3, 5, 6, 7, 10

ARGUMENT

DISPUTES OF FACT EXIST AS TO EACH OF THE EVIDENTIARY ELEMENTS ALLEGED TO SUPPORT DEDHAM'S BAN ON MIDNIGHT MOVIES, AS WELL AS ITS MOTIVE FOR BANNING THE MIDNIGHT MOVIES.

Where First Amendment values are at stake, this Court should be very wary of summary judgment, lest the requirements of its case law be sacrificed by foreshortened inquiry. This case presents a perfect instance in which to make that point.

Respondent's Brief only serves to confirm the existence of factual conflicts over the credibility of citizen complaints, the extent of constabulary concern and the legitimacy of alleged governmental interests. These factual issues should be resolved by the time-tested means of trial, for the alternative, is mere rational basis analysis — a standard of review wholly inappropriate with respect to governmental restrictions on First Amendment rights.[1]

Although a legislative body can act without first acquiring "irrefutable" proof, as the First Circuit ruled, (Pet. App. 21a), this Court still requires "substantial evidence" to sustain governmental regulation of speech activities, *Turner Broadcasting Systems, Inc. v. F.C.C.*, __ U.S. __, 114 S. Ct. 2445, 2471 (1994), which means more than anecdotal evidence coupled with educated guesses; *Rubin v. Coors Brewing Company*, __ U.S. __, 115 S. Ct. 1585, 1593 (1995); more than conjecture or speculation; *Edenfield v. Fane*, __ U.S. __, 113 S. Ct. 1792 1800 (1993); and certainly more than undifferentiated fear; *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S.

1. The First Circuit's decision leads to the same result, since it precludes objectively testing the very evidence which the Town proffers in support of the by-law.

503, 508 (1969). But, however much it is, is a question of fact that must be answered under objective criteria.

Moreover, Dedham's obligation to produce substantial evidence means it must do more than engage in rational basis analysis, which is what Respondent resorts to when it reads the "reasonable belief" language in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), to mean any belief will do. Indeed, given Respondent's argument, *Renton* would forever bar any adjudication of Dedham's regulation of speech activities, for members of Town Meeting are sure to believe what they complain about, even if their beliefs are wholly incredible, unfounded, conjectural and contradicted by other evidence - that is why some form of verification in the form of objective data is required to support Dedham's by-law banning midnight movies.[2]

In a [civilized] New England suburb like Dedham, racial animus, if it exists, is rarely made explicit.[3] That is the case here,

---

2. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) supports the argument that citizen complaints alone cannot, without some form of objective quantifiable evidence, sustain the constitutionality of laws regulating speech. The regulation in *Ward* was based on the City's efforts to "monitor sound levels" not mere complaints about them; it was a model of municipal restraint and sensitivity to First Amendment values. Dedham, by contrast, made *no* effort to measure and define the real effects of the late shows.

Likewise, the First Circuit, in another case, upheld regulation of licensed entertainment *only* because "dispositive levels" of crime, traffic and noise were "susceptible to quantification and measurement," and therefore were subject to "meaningful judicial review." *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981).

3. Respondent's repeated charge that the "racial animus" claim is a "desperate gamut [sic] to keep the case alive" is simply wrong. Resp. Br. at 24, 3-4, 15-16. In January 1991 Petitioner put forward a first draft of a statement of (Cont'd)

for during the course of this litigation, as the ground disappeared from under Dedham's allegations of neighborhood disturbance, evidence of racial animus surfaced.

Petitioner brought this case to challenge a by-law adopted by Dedham that concededly was aimed at banning "midnight movies", even though Petitioner's Showcase Cinemas had been exhibiting them *for more than ten years.* The movement for the ban began when a new resident solicited his neighbors by insinuating that midnight movie patrons were causing crime all over town. Unlike others who cloaked their racial fears in code words, this complainant went so far as to state, without the slightest backup, that "there were a lot of serious crime issues, riots that were stated as *race* riots at the Cinema." (R. A1702).[4] Citizens soon showed up at Town Meeting with what discovery later showed to be unsupported hyperbolic accusations that midnight movie patrons caused crime, traffic, noise and trash. They then promptly voted to ban all licensed entertainment in Town after 1 a.m.

(Cont'd)
facts focused upon its First Amendment right to exhibit midnight movies and the restriction imposed by Dedham's by-law. Dedham did not respond to this draft until the District Court ordered it to do so in January 1993. Dedham's response asserted governmental interests in preventing crime, traffic, noise and trash. One month later, also in accord with the District Court's schedule, Showcase filed a reply questioning both the substantiality of the evidence supporting Dedham's asserted governmental interests and the credibility of its motive in light of indications of racial fear.

4. Contrary to Respondent's assertion this statement had nothing to do with the exhibition of "New Jack City" in 1991; rather it reflected the complainant's views at the time he circulated the Petition to ban the midnight movies, as confirmed by another neighbor who testified that this complaint was not so typical "because we never had a problem until that was brought to our attention" (R. A1003).

Intensive discovery showed that the citizen complaints were incredible, either because they were not based upon personal knowledge, they were exaggerated, they were conjectural or just plain lies. In the end, Dedham was left without a single complainant who could firmly attribute crime, traffic noise or trash to midnight movie patrons. Indeed, Dedham now concedes that crime complaints have never been probatively linked to the midnight movies.[5] Resp. Br. at 14.

When it comes to traffic noise, citizen complaints proved to be pure guesswork, for the neighborhood adjacent to Showcase Cinemas is bordered not just by Elm Street, where Showcase has one of its exits,[6] but also by Route 1, a major thoroughfare, and U.S. 95, a six-lane interstate highway; so traffic noise comes from all directions, most noticeably from Route 95 where cars and trucks travel along at 55 miles per hour all night. (R. A1930). Not one complainant could identify the location or source of traffic noise heard at night, much less the level of such noise. (*Compare,* the confirmation of noise levels in *Ward v. Rock Against Racism,* 491 U.S. 781 (1988).)

Likewise, the innuendo that the midnight movie patrons dropped trash all over town was never substantiated as more than a throw-away itself, since no one tried to determine whether the trash came from J.C. Hillary's, Burger King, Finian's, Papa

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5. Acknowledging that the incidents of crime in question occurred earlier than the late night shows, Dedham nonetheless argues that the town has a right to ban late night movies to protect itself against such occurrences that *could* happen later. This kind of predictive "justification" is precisely what was rejected by the Ninth and Eleventh Circuits in holdings that now squarely conflict with this one. *Acorn Investments, Inc. v. Seattle,* 887 F.2d 219 (9th Cir. 1989) and *Krueger v. Pensacola,* 759 F.2d 851 (11th Cir. 1985).

6. Significantly, in addition to Showcase, a hotel and a restaurant also exist on Elm Street next to the neighborhood.

Gino's or any of the other commercial establishments along Route 1.[7]

At best, citizen complaints proved to be nothing short of guesses, precisely the sort of evidence this Court rejected in *Rubin*, 115 S. Ct. at 1593. At worst, the flimsiness of the complaints lent credence to the inference that something else lay behind them.

In short, by the end of discovery the record established, at a minimum, a serious dispute of fact as to whether so-called citizen complaints were *substantial*, for the foundation of the complaints had been pulverized and the existence of racial prejudice had come to the surface. Nonetheless, the First Circuit would not permit a trial to resolve this or any other factual dispute this case presents. Its affirmance of summary judgment works a disservice to the First Amendment that should be rectified promptly by this Court's remand for trial.

Summary reversal is also warranted by the conflict of fact over constabulary concerns. Any serious scrutiny of this record discloses that a so-called pattern of incidents neither related to midnight movies nor caused the constabulary any concern about them.

The testimony of Chief Teehan and Lieutenant Greenwood establishes that, despite rumblings of a less safe neighborhood, there was no evidence of boisterous behavior, squealing tires, or

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7. The record reflects other examples of fabricated evils that could have been subjected to objective investigation. For example, at Town Meeting one complainant imagined 2,000 cars exiting the parking lot at 2 a.m. The estimate is now down to 350 cars. Resp. Br. at 14. But that number too is greatly exaggerated. It assumes that the eight to ten theaters let out at once; they do not. It also forgets that couples usually attend in one car, particularly on the weekends, the only days when midnight movies are shown.

more than intermittent traffic, much less "serious crimes".[8] (R. A1544; A1113-14). In the most egregious of Respondent's innuendos to the contrary, its Brief pointedly mentions a late night stabbing on March 8, 1991, long after adoption of the by-law, even though Dedham has *nothing* to support the supposition that the stabbing was committed by late night patrons.[9]

Lacking believable citizen complaints or any pattern of incidents and constabulary concern, Dedham resorts to the last resort — "commonsense", *i.e.* commercial entertainment attracts crowds, crowds cause commotion, therefore the Town is justified in banning the late-night showings. But "commonsense" is just another name for "rational basis" analysis that, however appropriate to test economic legislation, has no place in determining the constitutionality of a First Amendment ban.[10]

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8. Chief Teehan testified that only five incidents occurred after the midnight movies between the hours of 1 a.m. and 6 a.m. (R. A2088); and four of the five involved property damage to automobiles that probably occurred before 1 a.m. when calls were received at the Police Station. (R. A1055). Only one incident conceivably related to the exhibition of midnight movies. Thus, there was no "pattern" of incidents to produce "constabulary concern"; and the First Circuit's finding of a "pattern" in the absence of any testimony to that effect, not only lacks an evidentiary foundation, but is in and of itself impermissible fact finding at this stage of the proceedings.

9. The Dedham police blotter shows that it shares in the crime problem that plagues this country. But of 106 assaults in Dedham between January 1990 and the date of the stabbing, only this stabbing incident occurred during the exhibition of the midnight movies. (R. A2029-87).

10. Respondent's brief provides an excellent example of how "commonsense" can mislead. To establish that "peace and tranquility" were at issue in the by-law, Respondent quotes from the testimony of Robert Cedrone. Resp. Br. at 10.

> The people in this neighborhood got to go to sleep. If

(Cont'd)

The First Amendment clearly commands more, as *Edenfield, Turner Broadcasting* and *Coors Brewing* make clear:

> In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way" (citation omitted) That burden "is not satisfied by mere speculation and conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate the harms it recites are real and that its restriction will in fact alleviate them to a material degree." (citation omitted) We cautioned that this requirement was critical; otherwise, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

Rubin, 115 S. Ct. at 1591.

To ensure that its pronouncements in the First Amendment area have teeth, this Court must insist that an alleged justification for a restriction on speech is supported by substantial evidence — not just speculation, conjecture, or their rough equivalent

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> they hear a noise outside, they're awake. They're sleeping on eggs out there.

How does Mr. Cedrone know that people are awakened? By what noise? Commonsense may suggest that late night movies will engender disturbing noise, but the only elderly person who testified on deposition, Mrs. Magdalene Wallstrom, reported that she was unaware of any traffic or noise problems in the neighborhood after midnight. (R. A1687).

"commonsense". Where, as here, there is a conflict in the evidence as to the alleged justifications for banning midnight movies, this Court should insist that a full trial — the traditional crucible for determining the facts — be held.

Moreover, this Court's insistence should be intensified where there is evidence of an illegitimate motive at play in adopting the regulation in question.[11]

There is evidence in this record that the real genesis of Dedham's by-law was the new resident's effort to put his neighbors in fear of "race riots" and veiled concerns of others about "out-of-towners" that masked racial biases. *See* Pet. 6-7. In addition, as Respondent notes, Resp. Br. at 18, Showcase has an expert in the field of sociology with special knowledge of racism who studied the adoption of the by-law and concluded that the forced closing of midnight movies would be an act of institutional discrimination against Showcase's black patrons.[12]

Finally, Respondent's reliance upon *Renton,* is misplaced. Respondent reads *Renton* as holding that a legislature may rely upon "whatever evidence it 'reasonably' believes to be relevant" when a regulation is targeted at the secondary effects of speech. Resp. Br. at 11. But even that formulation of the issue raises a

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11. Dedham's contention that its by-law was simply part of a twenty-year progression of by-laws designed to insure that commercial activities did not impinge on private life is groundless. Resp. Br. at 11. For example, Dedham took no such action of any kind between 1980 and 1989. (R. A48-49). Presumably, had Dedham enacted its by-law in 1999, it would characterize the by-law as part of a thirty-year progression.

12. Evidence of legislative motive may be taken to bear upon the issue of discriminatory intent. *Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217 (1993). *See also, Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, n.24 (1979).

disputed question of fact as to whether it was *reasonable* for Dedham to rely upon the flimsy evidence it had, after 10 years of experience with midnight films. *Renton* certainly did not sanction municipal reliance upon citizen complaints, but rather highlighted the importance of objective studies, even if, as in *Renton,* they are done in other relevant locations.[13] The fundamental point is that whether a belief is "reasonable" is determined under an objective, not a subjective, standard: *e.g.,* would the ordinary reasonable man deem the self-serving citizen complaints in this case to be credible.[14] This question is standard grist for the trial process where, as here, pre-trial discovery exposes the incredulity of alleged complaints.

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13. The credibility of studies involved in the *Renton* case was not at issue because the studies had been tested in an earlier trial in Seattle and approved by the Washington Supreme Court. *Northend Cinema Inc. v. Seattle,* 585 P.2d 1153 (Wash. 1978), *cert. denied,* 441 U.S. 946 (1979). In any event, Dedham neither made nor relied upon any studies, whatsoever.

14. Reasonableness can only be assessed in light of all the facts and circumstances. For example, in this case citizen complaints about midnight movie patrons making noise at a bus stop might seem credible until a review of bus schedules showed that the buses stop before the movies end. (R. A2713-29).

CONCLUSION

Ironically, Respondent's brief eloquently testifies to the factual conflicts that required a trial here. This Court should grant the petition for certiorari and reverse the summary proceedings below so that a full trial may be had during which the evidence supporting the public interests allegedly favoring the First Amendment ban are put to the test. Alternatively, the petition should be granted to permit full review of the issue and the conflict in the circuits created by the First Circuit's decision.

Respectfully submitted,

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